Supreme Court, U.S.
FILED
94 908 NOV 17 1994
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No. 94-

In The

Supreme Court of the United States

October Term, 1994

J.R. SIMPLOT COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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110 pp

I.
QUESTIONS PRESENTED FOR REVIEW

This case presents two questions for review.

1. Whether the National Labor Relations Board, in determining if the Union should represent employees at a new plant, erred by looking at "continuity of operations" instead of determining whether there was actually a question concerning representation when presented with a consolidation of two different plants with two completely different bargaining histories.

2. Whether the Board's method of determining majority status of employees at a consolidated plant operated by a seasonal employer improperly disenfranchised hundreds of seasonal workers by not determining majority status at peak season as is done in representation cases for seasonal employers.

II.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

None

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PETITION FOR WRIT OF CERTIORARI

Petitioner J.R. Simplot Company ("Simplot") respectfully requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 24, 1994.

OPINIONS BELOW

The opinion of the Ninth Circuit is not published. It is found in the Appendix at page App. 1. The Decision and Order of the National Labor Relations Board is

reported at 311 N.L.R.B. No. 61, and it appears in the Appendix at page App. 6.

JURISDICTION

The Judgment of the United States Court of Appeals for the United States was entered on August 24, 1994. The Petition for Writ of Certiorari has been filed within ninety (90) days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 7 of the National Labor Relations Act (the "Act"), 29 U.S.C. § 157, provides, in pertinent part:

> Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), provides that it shall be an unfair labor practice for an employer

> to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

Section 9(a) of the Act, 29 U.S.C. § 159(a), provides, in pertinent part:

> Representatives designated or selected for purposes of collective bargaining by a majority of employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such a unit for the purposes of collective bargaining . . . .

STATEMENT OF THE CASE

1. This case arises out of a consolidation of the J.R. Simplot Company's vegetable processing plants in Ferndale and Wenatchee, Washington, to a new, state-of-the-art plant in Quincy, Washington. The Quincy plant was to employ two to three times more employees, process new products, plus nearly all of the same products as had been processed by both the Ferndale and the Wenatchee plants previously, using new equipment, as well as some equipment transferred from the Ferndale and Wenatchee plants. Teamsters Local 760 ("Union"), which had represented the employees only in Wenatchee, demanded recognition. Simplot, however, had and continues to have a good faith doubt as to the majority status of the Union. It has, therefore, refused to recognize and bargain with the Union.

2. Simplot is a major food processing company with operations in several states. This case involves Simplot's Fruit and Vegetable Division, which is responsible for processing fresh fruits and vegetables for cold storage in large 1600 pound totes (prime pack) and later repacking them in customer-specific packaging (repack). During 1987 and 1988, Simplot reorganized its Northwest operations until it had only two Northwest plants: the

Wenatchee plant located in Central Washington about 175 miles east of Seattle, whose employees were represented by the Union; and the Ferndale plant in Northwest Washington about 90 miles north of Seattle, whose employees were represented by a union that has never been a party to these proceedings. The Ferndale plant prime packed green peas, cauliflower, and red potatoes. The Wenatchee plant prime packed sugar snap peas, corn and carrots. Wenatchee repacked all of the products it prime packed, plus green peas, red potatoes, some "California blends" (*e.g.*, broccoli, asparagus), and some sauce mixes.

3. In 1989, for economic reasons unrelated to labor issues, Simplot decided to close both the Ferndale and Wenatchee plants and to consolidate their operations in a new, state-of-the-art facility in Quincy, Washington, approximately thirty miles south of Wenatchee. To keep the Ferndale and Wenatchee plants open, Simplot would have been forced to invest approximately $8 million in nonproductive capital improvements. Quincy, by contrast, provided several efficiencies, including an offer from an independent cold storage company in Quincy to give Simplot land sufficient to build a plant adjacent to that company's storage warehouse, eliminating the need for the Quincy plant to have such a warehouse, as had been required in both Ferndale and Wenatchee. Simplot then began a fast track engineering and construction schedule, targeting June 1, 1990 as the opening date for the Quincy plant, the date when Simplot would normally start prime packing green peas.

4. Simplot notified the Union of its plans in May 1989 and bargained with the Union over the effects of closing the Wenatchee plant. Simplot notified the Union

that it would let the 1987-90 collective bargaining agreement covering the Wenatchee plant expire according to its terms on April 30, 1990. (Jt. Ex. 7)

5. Construction of the Quincy building shell was completed on May 1, 1990. Simplot conducted a grand opening ceremony on May 25, 1990, before the plant was completed and when, in the prime pack area, only the pea and sugar snap pea processing lines had been set in place. Those lines were not, however, ready for processing, and construction by pipefitters was ongoing during the ceremony. No prime packing was started until June 8, 1990, several weeks later. The line for processing lima beans, cut and cob corn, red potatoes, carrots, and russet potatoes had not yet been even placed.

In the repack section of the plant, only half the package lines had been installed by May 25.

Installation of the corn line was completed on or about July 21, 1990. Mechanics did not complete installation of the red potato processing line until approximately August 20, 1990, and they completed installation of the carrot line only one to two days before processing started on October 7, 1990.

6. Simplot expected that once the Quincy plant was fully operational, it would employ a prime pack season employee complement of at least 450 employees, for two shifts and more in the likely event of three shifts. The prime pack season ran from early June to late November. By May 25, 1990, however, Simplot was nowhere near fully operational in Quincy: only 139 employees were employed at the plant, most of whom were working on either construction or in the repack area.

7. The differences between the Wenatchee and Ferndale plants and the Quincy facility were significant. Testimony before the Administrative Law Judge in this case focused mainly on a comparison between the Wenatchee and Quincy operations because only the union that had represented unit employees in Wenatchee sought to represent them in Quincy. The significant difference between the two included the following:

Employee Complement. In Wenatchee, Simplot needed approximately 225 employees at the peak of the prime pack season, while in Quincy, Simplot needed at least 450 (for only two shifts, more for three), or twice as many. With the transfer of 16 employees from the Ferndale plant and new hires, hired mainly through the Quincy, Washington Job Service Center (not Wenatchee's), by September 15, 1990 only 34% of Quincy's "unit" employees had formerly worked at the Wenatchee plant, and by September 30, 1990, only 30% of the Quincy "unit" employees were former Wenatchee unit employees.

Size. In addition to a significant increase in the number of employees, the Quincy plant also was four times larger than the Wenatchee plant and three times larger than Ferndale. It did not have a cold storage facility, which both Wenatchee and Ferndale had.

Equipment. Equipment for the Quincy plant came from Wenatchee, Ferndale, another Simplot plant in California, and hundreds of thousands of dollars in new purchases, including repack lines, a cabin blancher, a laser color sorter, a steam peeler, a blending system, and a bar coder. Because some of the new equipment, such as

the cabin blancher, was far more technical to operate than the equipment that had been used in either Wenatchee or Ferndale, Quincy employees had to be specially trained on the new equipment, and leadpeople were trained in new management techniques because of the change in organization that the vastly increased production rate required. Overall, the difference in equipment improved production capacity from 24 tons per hour in Wenatchee and Ferndale to 75 tons per hour in Quincy, and significantly increased quality because of new on-line product testing procedures and the equipment operators and quality auditors assigned to each prime pack processing line.

Employee Responsibility. Because of the change in size, speed and equipment, Simplot instituted a Total Quality Management System, giving Quincy employees responsibility for the quality of the product, responsibility that the employees at Wenatchee and Ferndale had not had. Along with that responsibility came the authority for quality auditors and equipment operators to completely shut down the processing line when quality problems appeared, something that could not have been done at the Wenatchee plant.

Customer Base. With the opening of the Quincy plant, Simplot's Northwest customer base changed significantly because of the increased production capacity, the addition of the new lines, and the improved operations within the plant. For example, Green Giant, a new customer, signed a contract for 30 million pounds of production in one year, which equaled *one-third* of Quincy's

entire 1990 production, and Wenatchee's *entire* production in 1989. Furthermore, Schwan, a new customer, purchased the pasta blends produced at Quincy, a product that neither Wenatchee nor Ferndale had produced.

8. The Union requested recognition for the employees at the yet-to-be completed Quincy plant on February 13, 1990. As of that date, there were only two unit employees working at the Quincy plant (maintenance employees), and neither of them had worked at the Wenatchee plant. The Wenatchee plant was, at that point, still operational in the repack area. Simplot did not know how many employees from the Wenatchee plant would elect to transfer to the Quincy plant, 35 miles away. Simplot has continued to refuse to recognize the Union as the collective bargaining representative for the Quincy plant employees because it continues to have a good faith doubt as to the Union's majority status.

9. On January 25, 1991, the Board's General Counsel issued a Complaint alleging that Simplot had violated Sections 8(a)(1) and 8(a)(5) of the Act in refusing to recognize the Union as the collective bargaining representative at the Quincy plant. After conducting a two day hearing in Wenatchee in April 1991, Administrative Law Judge Timothy D. Nelson issued a decision on September 23, 1992, finding that Simplot had violated Sections 8(a)(1) and 8(a)(5) of the Act. (App. 9) The Board affirmed the Administrative Law Judge's decision on May 28, 1993. (App. 6) Simplot filed a Petition for Review before the Ninth Circuit on June 29, 1993, and the Board cross-petitioned for enforcement.

The Ninth Circuit issued its decision on August 24, 1994, finding that Simplot violated the Act by refusing to recognize the Union as the representative of the Quincy employees. It referred to the obvious plant consolidation as a "business relocation" and applied a "continuity of enterprise" test and the "substantial percentage (40% or more)" test utilized in *Harte & Co.*, 278 N.L.R.B. 947 (1986). The Ninth Circuit found that the Board's use of May 25, 1990 as the relevant date for determining whether former Wenatchee employees represented a substantial percentage of Quincy workforce was incorrect, and instead suggested a late August date.

REASONS FOR GRANTING THE WRIT

This case presents important and recurring issues pertaining to the Board's application of continuity of operations and majority status tests in situations involving plant consolidations and plant relocations. The Court should address these issues in order to:

(1) Resolve a conflict between the Circuits concerning the appropriate standards to be applied in determining a company's duty to bargain with the union when a company consolidates several plants into a new location as opposed to simply relocating a plant; and

(2) Bring the Board's test for "substantial percentage" into conformity with the National Labor Relations Act and with the Board's practice in representation cases as applied to seasonal workers.

These issues arise from the most basic provisions of the National Labor Relations Act. Section 7 of the Act, 29 U.S.C. § 157, guarantees employees the right "to bargain collectively through representatives of their own choosing." Once chosen by a majority of the employees in an appropriate unit, the bargaining representative "shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining." 29 U.S.C. § 159(a).

A fundamental aspect of the Act is the freedom of choice - to determine whether employees want a union to represent them, and if so, which union. This aspect of the Act is so fundamental that the Board, in representation cases, mandates that elections be held at the peak of seasonal employment for seasonal employers in order to avoid disenfranchising all of the seasonal workers.

In cases of plant relocation or consolidation the Board must strike a balance between (1) industrial stability for companies with long bargaining histories and (2) freedom of choice. In this particular case, the Board has said that the employees do not get a choice - that it will only look to industrial stability by applying the substantial percentage test at a nonpeak time. Although the Board clearly has the right to strike the balance, it cannot ignore the freedom of choice in striking that balance. Thus, there must be a rule established that when a seasonal employer either consolidates or relocates a plant, thereby raising an issue of majority status, the determination shall be made at peak of season, as in representation cases, in order to avoid disenfranchising the substantial seasonal workforce.

I.

THE DECISION BELOW CREATES A CONFLICT BETWEEN THE CIRCUITS REGARDING THE APPROPRIATE STANDARDS FOR DETERMINING MAJORITY STATUS IN CONSOLIDATED-PLANT CASES

It is undisputed that the Quincy plant was equipped and staffed from *both* the Ferndale and Wenatchee plants, both of which completely ceased operations with the opening of the Quincy plant. It was clearly a consolidation of two plants. Yet, the Ninth Circuit stated in its opinion below

> in cases involving business relocation, the Board has held that an existing collective bargaining agreement remains in effect after relocation (1) if there is '*continuity of enterprise*' between the old and new facility, meaning 'the operations at the new facility are substantially the same as those at the old,' and (2) if employee transferees from the old facility 'constitute a *substantial percentage* – approximately 40% or more – of the new plant employee complement.'

(Emphasis added.) In support of that premise, the Ninth Circuit cited *Harte & Co., Inc.*, 278 N.L.R.B. 947, 948 (1986).

The Second Circuit, in *NLRB v. Hudson Berlind Corp.*, 494 F.2d 1200 (2d Cir. 1974), found there was substantial evidence to support the Board's finding that a company's new Hicksville facility was a separate unit from the prior H. Berlind's Floral Park, New York plant and the prior Hudson Houseware Corporation's Brooklyn facility because it was a consolidation of two previously separate units and some distance away from each of the other

plants. *Id.* at 1203. The Second Circuit further found that because Hicksville was a separate new unit, the issue of *continuity* was not the standard. When there is a consolidation involving employees represented by two separate unions as there was in this case, the test should be whether there was a real "question concerning representation."

This distinction between the standards applied on relocation and consolidation cases was noted by the Board itself in *Harte & Co., Inc.*, 278 N.L.R.B. 947 (1986) at n.11, wherein the Board stated:

> Our decision in *Hudson Berlind Corp.* [citation omitted] is also inapplicable on the facts of this case. In *Hudson Berlind*, a company acquired two wholesale distribution firms, the employees of each of which were represented by two separate unions. The company merged the two operations into a third facility and, before opening the new facility or transferring any employees, recognized the union which represented the employees at the larger of the two purchased firms as the exclusive representative of the employees at the new facility. The Board held that this recognition, prior to the transfer of employees and in the face of competing union claims, was premature and violated Section 8(a)(2). The present case is distinguishable because it involves the *mere relocation* of a single facility rather than the merger of facilities with collective bargaining histories and because here there is no other union with a claim to represent the Bound Brook employees. *McKesson Drug Co.*, 257 N.L.R.B. 468 (1981), cited by the General Counsel to support the contention that Harte's recognition of the Union at Bound Book was

> premature, is similarly inapposite because the management action involved there was not a *mere relocation* of one facility but rather a merger and consolidation of three distinct facilities, two of which had separate histories of collective bargaining, into one facility at a new site.

(Italics added.)

Thus the Board and Ninth Circuit's use of the *continuity of operations* standard in this consolidated plant case is clearly contrary to prior Board precedent and in conflict with the Second Circuit's standard of a question concerning representation for a new and separate unit. This issue should be resolved by this Court.

II.

THE BOARD'S DECISION TO MEASURE MAJORITY STATUS OF THE UNION AT THE QUINCY PLANT PRIOR TO PEAK SEASON DISENFRANCHISED HUNDREDS OF SEASONAL WORKERS, VIOLATING THEIR SECTION 7 RIGHTS

Even if a continuity test were appropriate and the issue was whether a substantial percentage of employees from the Wenatchee plant made up the Quincy plant employee complement, the Board and Ninth Circuit's decisions disenfranchised several hundred seasonal workers because they failed to measure majority status at peak employment for this seasonal employer. This is directly contrary to the employees' Section 7 rights.

The Board has addressed the issue of a majority status in the context of seasonal employment in representation election cases, where the Board has consistently held that seasonal employees who have a reasonable

expectation of re-employment for the next season should be included in the unit for voting purposes. For that reason, representation elections in seasonal industries occur when the employer has reached its peak season.[1]

Elections at peak season are necessary in order to protect employees' freedom of choice integral to their Section 7 rights. To allow the "year-round" employees to make all determinations but then hold seasonal employees subject to any collective bargaining agreement and possibly require them to become members of such a union without having had any say whatsoever in the matter is fundamentally contrary to the purposes of the Act.

In this case, the date for determining whether 40% of Simplot's Quincy employees were former Wenatchee employees should have been in late September 1990, during the peak of the season when Simplot processed peas, cob and cut corn, and red potatoes, and when there were more overlapping runs than at any other time of the year.

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[1] Examples of the Board's application of this policy are abundant. For example, in *Brooksville City's Grower Ass'n*, 112 N.L.R.B. 93 (1955), the union sought to have the election during the seasonal employer's April to June season, when the employer employed only 50% of its peak employee complement. The Board, however, directed that a representation election be held at the employer's peak during the October to March season. Similarly, in *Knouse Foods Co-operative, Inc.*, 131 N.L.R.B. 801 (1961), the Board directed the election to be held at or about the peak of season, rejecting the union's request for an election within thirty days on the basis that no seasonal employees were currently employed. *See also Industrial Forestry Ass'n*, 222 N.L.R.B. 295 (1976) (postponing representation election until the "next season peak of employment . . . ").

To use any other cutoff date would disenfranchise all of Simplot's seasonal employees, contrary to established Board precedent and to principles and policies of the Act.

On September 1, 1990, the Quincy plant employed a total of 404 unit employees, 139 (34%), of whom had been employed at the Wenatchee plant. As of September 15, 1990, the unit employed 407 unit employees, of which 137 (34%), had been employed at the Wenatchee plant. As of September 30, 1990, Quincy employed a total of 431 unit employees, of which 135 (31%), were former Wenatchee unit employees.

The Ninth Circuit determined that "late August" should be the determining time period, stating the plant was then "fully operational." Using the September 1st date (there was no "late August" date in evidence), substantially less than 40% of the employees were from Wenatchee. This clearly was not at the peak time, and using the August 15 date does not take into account that, as of August 15, processing had commenced only on green peas and sugar snap peas and corn. Processing had yet to start on red potatoes, lima beans, carrots, russet potatoes, or pasta. Corn did not finish production until September 28, 1990, so that as of September 15, 1990, only corn, red potatoes, and lima beans were being processed.

III.

THE DECISION BELOW IMPROPERLY DISCOUNTS FACTORS LEADING TO A GENUINE GOOD-FAITH DOUBT OF THE UNION'S CONTINUED MAJORITY STATUS.

Even if the Ninth Circuit had been correct in applying the continuity test for relocated plants instead of the question concerning representation test for consolidated plants, it did not look at the full issue of continuity, but looked only at whether a substantial complement of Quincy plant employees had worked at the Wenatchee plant. The employee complement is not the sole standard for determining good-faith doubt in cases when the "continuity test" is applied.

In determining whether a doubt exists as to a union's claimed majority status, the Board has developed a *two-part* test to apply in cases involving plant relocations. In essence, the Board has held an employer lacks a good-faith doubt as to majority status

> [1] If the operations at the new facility are substantially the same as those at the old facility and
>
> [2] If the transferrees from the old plant constitute a substantial percentage – approximately 40% or more – of the new plant employee complement.

Harte & Co., 278 N.L.R.B. 947, 948 (1986).

In looking at the first prong of the test, the Board has regularly considered changed circumstances, such as changed operations, new equipment, new methods of production and new customers as giving rise to a good-

faith doubt on the part of the employer. *See, e.g., Westwood Import Co. v. NLRB*, 681 F.2d 664, 666 (9th Cir. 1982); *American Florescent Corp.*, 275 N.L.R.B. 1097 (1985).

The Board, violating the principles of the Act and denying freedom of choice to all the Quincy employees, did not consider the first prong of the test in this case.

The most telling operational factor in this case is also the simplest: of the eight products processed in Quincy, five had never been processed in Wenatchee, and two – lima beans and russet potatoes – had never been processed by Wenatchee or Ferndale. Quincy also added a line of pasta blends using equipment brought in from Simplot's California operations. Given these product changes, the operations as a matter of law could not have been "substantially the same" as between Wenatchee and Quincy.[2]

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[2] The Board has certainly acknowledged the importance of this change in products. In *Hudson Berlind Corp.*, for example, the Board noted that "respondent combined and merged the operations of the former Hudson and Berlind warehouses. It also added some new product lines." 203 N.L.R.B. at 422.

Similarly, in *General Elec. Co.*, 170 N.L.R.B. 1272 (1968), the Board found that a new election was required because the Board could not lawfully recognize either of the preexisting unions without an election after two plants were consolidated. One of the factors considered was the difference in the product lines:

> The differences in the two operations related *primarily to products handled*. Although both product lines consisted of the same types of appliances [footnote omitted], there are differences in the parts. Of the 40,000 parts used in General Electric and Hotpoint appliances, only 1,200 are interchangeable . . . . Because of these product variations, employees who

The expansion of products being processed at Quincy necessitated the addition of completely new equipment processing lines. Where the equipment is new or even largely new, the Board counts that factor towards a good-faith doubt. For example, in *American Florescent Corp.* the Board held that withdrawal of recognition was appropriate, in part because "about half of the equipment is new" even though the basic work tasks of the employees were not impacted. 275 N.L.R.B. at 1100.

Finally, Simplot's implementation of the Total Quality Management program that allowed employees working on the line to shut down the system instead of going in search for the lead man, and making employees responsible for the overall quality of the product was a major change in the operations.

Thus, a number of factors previously determined by the Board to be essential for recognizing a union from a closed plant in derogation of the rights of employees who have never worked there caused Simplot to have a good-faith doubt as to the Union's continued representation of employees at Quincy: (1) the former Wenatchee workers made up less than forty percent of the Quincy workforce at the relevant date; (2) the 30-mile distance between the Wenatchee and Quincy plants was significant in a very rural setting; (3) more than half of the equipment was new; (4) Simplot obtained new customers such as Green Giant (whose one order equaled the total annual production capacity of the Wenatchee plant); (5) Quincy did not

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> worked on one product line must familiarize themselves with the new product line . . . .

170 N.L.R.B. at 1273 (emphasis added).

provide for cold storage and implemented a TQM system that *significantly* impacted the responsibilities of employees for the quality and quantity of production; and (6) the new workers came from the Quincy, rather than the Wenatchee, labor market.

Under the Board's ruling in *American Florescent*, these factors should have been enough to cause a good-faith doubt as to majority status.[3]

The Board, having laid down these tests, was not free to ignore them and simply proclaim that, in its view, the balance tipped the other way in this case. In similar circumstances, the First Circuit reversed the Board's finding of an unfair labor practice as clearly erroneous. In *NLRB v. Massachusetts Machine & Stamping, Inc.*, 578 F.2d 15, 18 (1st Cir. 1978), the *Board* had found continuity between an old plant and a new, based upon the status of operations as of the date the new plant opened its doors. Stressing the "individual rights" of new employees and calling the Board's approach "unnecessarily rigid and

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[3] American Florescent opened a new plant in Waukegan, 35 miles away from its original Chicago location. The employer planned to relocate all of its 65 union employees, but only 20 executed a form showing their intent to move, and nine later submitted retractions.

In determining that the employer properly withdrew recognition, the Board noted that (1) former Chicago employees made up less than one-third of the Waukegan workforce; (2) the 35 mile distance between the two plants was significant; (3) half of the equipment was new; (4) one-fifth of the customers were new; (5) although the work task remained essentially the same, storage, shipping and receiving were modified; and (6) the replacements came from "an entirely different labor force." 275 N.L.R.B. at 1102.

mechanistic," the *First Circuit* held that the employer had overcome the presumption of a majority status by showing the existence of a good-faith doubt.

The facts in *Massachusetts Machine* are strikingly similar to the relevant facts in this case except that in *Massachusetts Machine* there was no consolidation of two plants, but rather a relocation of one. The employer in that case had opened a new facility approximately 40 miles away from its old plant. After considering the number of employees transferring, the existence of the new labor pool, the fact that the company did not have a substantial complement of employees on its opening day and the fact that the company expected that the number of employees would increase in a short period of time, the court held that this combination of factors adequately supported a finding of good-faith doubt as to continued majority status. 578 F.2d at 18.

The same analyses should be used in this case. The Quincy plant reflected significant and substantial changes in the equipment, methods of production, product lines and customers from the Wenatchee plant, causing a lack of continuity and giving rise to a doubt as to the union's continued majority status. Since neither test has been met, reversal should follow as a matter of course.

IV.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeal for the Ninth Circuit.

DATED this 11th day of November, 1994.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J.R. SIMPLOT COMPANY, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	No. 93-70569 NLRB No. 19-CA-20964
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. J.R. SIMPLOT COMPANY, Respondent.	)	No. 93-70624 NLRB No. 19-CA-21228 MEMORANDUM*

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Argued and Submitted, August 4, 1994
Seattle, Washington

Before: ALARCÓN, BEEZER and KLEINFELD, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

J.R. Simplot Company ("Simplot") petitioners for review of a decision and order of the National Labor Relations Board ("Board"). The Board concluded that Simplot violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 158(a)(1), (5), when it refused to recognize Teamsters Local 760 ("the Union") as the collective bargaining representative of employees at its plant in Quincy, Washington. We have jurisdiction pursuant to 29 U.S.C. § 160(e) and (f), and we enforce the order.

I

Under section 8(a)(1) of the Act, an employer commits an unfair labor practice if it interferes with its employees' rights to organize and bargain collectively. 29 U.S.C. § 158(a)(1); *see id.* § 157. Section 8(a)(5) prohibits an employer from refusing to bargain collectively with its employees' representative regarding rates of pay, wages, hours of employment, or other conditions of employment. *Id.* § 158(a)(5); *see id.* § 159(a).

Once an employer has recognized a union, the union is conclusively presumed to command majority allegiance. *NLRB v. Wilder Constr. Co.*, 804 F.2d 1122, 1124 (9th Cir. 1986). This presumption becomes rebuttable after a contract expires. *Id.* The company's subsequent withdrawal of recognition and refusal to bargain establishes a prima facie case of unfair labor practice. *Id.* "There is a continuing duty on the employer to recognize and to bargain with the union until the presumption of majority

support is rebutted." *Id.* Refusal to bargain may be justified if the employer had a "good faith doubt" as to the union's majority status. *Id.*

In cases involving business relocation, the Board has held that an existing collective bargaining agreement remains in effect after relocation (1) if there is "continuity of enterprise" between the old and new facility, meaning "the operations at the new facility are substantially the same as those at the old," and (2) if employee transferees from the old facility "constitute a substantial percentage – approximately 40 percent or more – of the new plant employee complement." *Harte & Co.*, 278 N.L.R.B. 947, 948 (1986).

We will enforce an order "when the Board's factual findings are supported by substantial evidence on the record as a whole, and the Board's application of those findings is rational and consistent with the Act." *Westwood Import Co. v. NLRB*, 681 F.2d 664, 666 (9th Cir. 1982).

II

A

Simplot argues that there is a lack of continuity of enterprise between the Quincy and Wenatchee plants. We disagree.

The Board considers certain factors in determining whether continuity exists: "(1) continuity of operational methods, managerial hierarchy, customers, and services or products; (2) distance between the old and new plants; and (3) changes in either the size, makeup, or the identity

of the employee complement." *Westwood Import Co.*, 681 F.2d at 666.

Although some product lines, equipment and methods of operation at the Quincy plant differ from those at the former Wenatchee facility, substantial evidence supports the Board's finding of continuity of enterprise between the Wenatchee and Quincy plants. The year-round Quincy employee complement is not significantly larger than that maintained at Wenatchee, former Wenatchee employees perform the same jobs under the same supervision at Quincy as they had at Wenatchee, the Quincy plant is only 30 miles from Wenatchee, and the addition of certain varieties of produce at Quincy neither changed job duties and classifications nor altered the nature of Simplot's operations, which is to prime pack and repack produce. In general, the company continues to operate as it had in Wenatchee, using a core, year-round work force and hiring temporary workers during the harvest season.

B

Simplot also argues that it had a good faith doubt as to the Union's majority status among its Quincy employees.

To overcome the presumption of majority status, an employer must show either that the union in fact no longer had majority support or that the employer's "refusal to bargain was predicated upon a reasonably grounded good faith doubt of majority support." *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1977). We apply an objective test to a

claim of good faith doubt, "although subjective evidence may be used to bolster the argument that such doubt existed at the relevant time." *Id.* (quotation omitted).

The Board concluded that the relevant date for determining whether former Wenatchee employees represented a majority of the Quincy workforce was May 25, 1990, the date of the Quincy plant's grand opening. We disagree with the Board's conclusion that the Quincy plant was fully or even substantially operational on this date. The record suggests that the grand opening date was chosen for convenience and did not signify completion of construction or of equipment installation.

Even in late August 1990, however, when the plant was fully operational, former Wenatchee employees constituted at least 40 percent, or a substantial percentage, of the Quincy employee complement. Substantial evidence in the record as a whole thus supports the Board's conclusion that Simplot lacked a good faith doubt as to the union's majority status.

III

Because Simplot did not rebut the presumption that the Union commanded majority allegiance among the Quincy employees, the Board's order is

ENFORCED.

J. R. Simplot Company *and* General Teamsters, Food Processing Employees, Public Employees, Warehouse and Helpers, Local 760, International Brotherhood of Teamsters, AFL-CIO.[1]
Cases 19-CA-20964 and 19-CA-21228

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 23, 1992, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel filed exceptions and a supporting brief; and the Respondent filed exceptions, a supporting brief, and a response brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt

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[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The judge inadvertently omitted the jurisdictional findings. Based on the record, we find that the Respondent, a Nevada corporation, engages in food processing at its facilities in Boise, Idaho, and Quincy, Washington, where it annually has gross sales of goods and services in excess of $500,000; and where it annually sells and ships goods or provides services from its facilities within the State of Washington to customers outside the State, or to customers within the State who were, themselves, engaged in interstate commerce by other than indirect means, of a total value in excess of $50,000. We find that the Respondent is an employer engaged in commerce within the

the recommended Order.[3]

The judge found, and we agree, that the Respondent, an operator of a recently closed plant in Wenatchee, Washington, where the Union was the employees' bargaining representative, violated the Act by refusing to recognize and bargain with the Union as the representative of the employees at the Respondent's newly opened plant in Quincy, Washington. The General Counsel has excepted to the judge's failure to require the Respondent to make whole the Union for the loss of any dues revenues which the Union would have received through the checkoff provisions of the parties' contract covering the Wenatchee unit employees who transferred to Quincy. For the reasons set forth below, we find that the judge properly refused to grant the General Counsel's requested remedy.

It is well settled that an employer's obligation to abide by the terms of a checkoff provision ceases with the expiration of the contract. See *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enfd. in relevant part 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). The General Counsel's theory relies on a contract clause that provides for automatic continuation from year to year in the absence of an effective

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meaning of Sec. 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] We find, as argued by the General Counsel on exception, that the make-whole remedy in the judge's recommended Order applies to seasonal employees because they are encompassed by the unit that the parties stipulated as appropriate for collective bargaining at the Respondent's Quincy facility.

Additional amounts due the benefit funds under the judge's recommended Order shall be determined by the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

termination. The General Counsel, however, has not excepted to the judge's specific finding that the parties' contract expired on the day before the employee transfer. Further, in the cases on which the General Counsel relies, the parties' contracts would have continued but for the unfair labor practices. In the instant case, we cannot say with surety that the contract would have continued had the Respondent fulfilled its bargaining obligation. We therefore will not speculate on what the parties might have done about the expired contract in the absence of the Respondent's insistence that the new facility be nonunion. See, e.g., *Xidex Corp.*, 297 NLRB 110, 118 (1989), enfd. 924 F.2d 245 (D.C. Cir. 1991). Accordingly, we find no merit to the General Counsel's exception.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, J. R. Simplot Company, Boise, Idaho, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. May 28, 1993

James M. Stephens, Chairman

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD(SF) – 125 – 92
QUINCY, WA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

J. R. SIMPLOT COMPANY

and

Cases 19-CA-20964
19-CA-21228

GENERAL TEAMSTERS, FOOD PROCESSING EMPLOYEES, PUBLIC EMPLOYEES, WAREHOUSE AND HELPERS, LOCAL 760, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

Patrick Dunham, Esq., of Seattle, Washington, for General Counsel
Kathleen A. Anamosa, Esq. (Davis, Wright & Tremaine), of Seattle, Washington, for the Respondent
Kenneth J. Pedersen, Esq. (Davies, Roberts & Reid) of Seattle, Washington, for the Charging Party, Teamsters Local 760

DECISION

TIMOTHY D. NELSON, Administrative Law Judge:

In this prosecution, the Board's General Counsel claims that J.R. Simplot Company (Simplot), operator of a recently-closed plant in Wenatchee, Washington where

Teamsters Local 760 (the Union) was the employees' bargaining agent, owed and violated a duty to recognize and bargain collectively with the Union as the representative of employees at its newly-opened plant in Quincy, Washington. Simplot disputes this, claiming a right to open and operate Quincy on a "nonunion" basis. I heard the merits in trial in Wenatchee on April 10 and 11, 1991, where all parties were represented by counsel. Before penetrating the merits of the statutory controversy any further, I will find it necessary to describe and discuss the background as it relates to an arbitration of a contract dispute between the Union and Simplot. This might not have been required were it not for the General Counsel's claim on brief that, for some purposes, at least, the arbitrator has pronounced the "law of this case."[1]

The dispute first came to the Board's attention on June 15, 1990, when the Union filed unfair labor practice charges against Simplot with the Regional Director for Region 19. The Director conducted a preliminary investigation; then, on July 31, he advised the parties in writing that he would "defer" action on the charges, pending the outcome of a scheduled arbitration of a grievance the

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[1] G.C. Br., p. 5, fn. 3, where counsel asserts that the "issue of the status of these employees [a certain group of Wenatchee transferees] was encompassed in the Arbitration Award[,]" and then concludes, somehow, that,

> [i]t is now the law of this case that they were covered by the collective bargaining agreement and that Respondent was obligated to recognize the Union as the representative of the employees who were, at least at the time of the assembly work, employed at Quincy.

Union had filed under the Wenatchee labor agreement. That grievance alleged that Simplot's refusal to continue to apply the "terms and conditions" of the Wenatchee contract at the new Quincy plant violated a "transfer of operations" clause in Article II of that same contract, which stated:

> **Section 3: Maintenance of the Collective Bargaining Agreement**
>
> In the event the Company elects to transfer in whole or in part its operations to any other city, community, or area within the Union's territorial jurisdiction,[2] it is agreed that all of the terms and conditions of this Agreement shall be applicable to such an establishment.

The arbitrator issued a decision on August 22, finding that the transfer clause was "clear and unambiguous,"[3] and that the closing of Wenatchee and opening of Quincy involved at least "in part" a "transfer" of Wenatchee "operations" to Quincy.[4] He thus held that, " . . . the Employer violated the collective bargaining agreement in failing to apply its terms and conditions to the newly-opened plant in Quincy, Washington."[5] The arbitrator was careful to stress that other "considerations" (e.g., "eventual majority status of the Union . . . , representative complement . . . , changes in supervisory hierarchy, . . . new product lines and equipment and . . . greater processing capacity") were "irrelevant" to

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[2] The Union's "territorial jurisdiction" includes Quincy.

[3] Jt. Exh. 8, p. 11.

[4] Id., pp. 11-13.

[5] Id., p. 15.

his contract-interpretation task, even though "[t]hose may well be matters with which the NLRB concerns itself. . . . "[6] Moreover, the arbitrator was aware of the Union's pending unfair labor practice charge, but he "specifically decline[d] to address . . . or to decide whatever allegations are set forth in that charge." He found likewise "irrelevant" any question of Simplot's antiunion "animus."[7] The arbitrator also declined to prescribe a remedy for this violation, pending supplemental hearing and argument, which had not been concluded when this trial record closed.

On November 23, the Union filed a second charge, renewing and updating its earlier charges. On January 25, 1991, the Director notified the parties in writing that he would no longer defer. On the same date, the Director issued a consolidated complaint in the name of the Board's General Counsel, charging Simplot with violations of Section 8(a)(5) of the Act, and derivatively, of Section 8(a)(1), all tracing to Simplot's refusal to relocate the labor relationship from Wenatchee to Quincy as part of its alleged "relocation" of the Wenatchee plant operation to Quincy.[8] Answering the complaint, Simplot admitted that its operations are subject to the Board's statutory

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[6] Id., p. 11.

[7] Id., pp. 13-14.

[8] The complaint as I construe it more specifically attacks as Section 8(a)(5) violations the following (now-admitted) actions of Simplot: (a) refusing to recognize the Union as the exclusive collective-bargaining representative of the Quincy workers as soon as they began working at Quincy; (b) refusing to apply the Wenatchee labor agreement through its April 30 term to Wenatchee Unit employees sent to work at Quincy during a pre-

and discretionary jurisdiction, and further admitted most of the fact background selected to be alleged in the complaint, but it denied that it owed any duty to carry-over the Wenatchee labor relationship to the new Quincy operation, and pleaded affirmative defenses.

The arbitrator's findings, made on a different record, and his conclusions, resting exclusively on contract-interpretation, will not influence my findings, nor my analysis of the statutory merits of the case submitted to me. The General Counsel's "law of the case" notion is confusing, inconclusively developed, and is seemingly at odds not just with the Act's commands[9] but with his own

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April 30 transitional phase, and (c) refusing after the April 30 expiration of the Wenatchee contract to apply to Quincy employees the wages and other terms and conditions of employment established by that agreement, pending good-faith bargaining for a new contract for the Quincy employees, and instead acting unilaterally with respect to all such issues.

[9] "Law of the case" usually implies that a judge or other juridical body (court or agency) with jurisdiction over a specific pending case has already conclusively ruled on some portion of that *same* case, and has thus to some degree or other delimited the range and scope of any subsequent litigation or analysis in *that* case. An arbitrator of a contractual grievance plainly has no jurisdiction nor power to thus impose the "law of the case" on a separate and distinct proceeding under the National Labor Relations Act. Section 10(a) of the Act makes this unmistakably clear; it states (my emphasis) that the Board's,

> . . . [power] to prevent . . . any unfair labor practice . . . *shall not be affected* by any other means of adjustment or prevention that has been . . . established by agreement, law or otherwise.

It is therefore obvious that "law of the case" notions cannot operate to "bind" the Board to a prior arbitral result. (Voluntary "deferral" by the Board in the limited way envisioned in *Spielberg* is a separate question, which I address separately below.)

disclaimers at trial.[10] And if "law of this case" is intended to suggest something more modest – that the arbitration decision deserves "deference" under some application of *Spielberg/Olin*[11] principles, I reject the suggestion: First, I think it is both untimely and barred by the doctrine of estoppel by waiver for the General Counsel now to argue for any form of deferral.[12] Wholly apart from those

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[10] Near the trial's outset, the parties submitted a series of joint exhibits; they included the arbitrator's decision and associated papers, such as the parties' supplemental briefs to the arbitrator. I questioned the purpose for which these arbitration exhibits were being submitted, particularly the arbitrator's decision. In the ensuing colloquy, each party seemed to disavow any claim that the arbitrator's decision should be deferred to in any way. Indeed, counsel for the General Counsel affirmed that he was "not going to argue that some finding made by [the arbitrator] binds Respondent or in some way amounts to *res judicata* or in some other way allows me [the judge] to make a finding on the same facts found by [the arbitrator]." Tr.18:12-25; and see the surrounding colloquy at Tr.17:11-19:25, in which counsel for the General Counsel asserted in various ways that he viewed the arbitration award as "relevant" only insofar as it illuminated certain unspecified "admissions" made by Simplot when it responded to the award. (Despite this, the General Counsel's brief does not identify any such "admissions.")

[11] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).

[12] I refer specifically to three distinct actions by the prosecutor, any one of which were arguably sufficient to operate as waivers of any claim of deferral, and which, taken together, certainly establish such a waiver. First, the Director, acting as the General Counsel's agent, considered the arbitration award, and then advised the parties that he would not defer. Second, acting in the same capacity, the Director simultaneously issued a complaint alleging facts and conclusions which in no way referred to the arbitration; much less did the complaint suggest

points, I would not find it appropriate to defer. The arbitrator could not have been more explicit in declining to "consider" the statutory issues, and the facts relevant to them; indeed, he plainly found it entirely inappropriate to his function to decide the grievance submitted to him in terms of its possible merits under the National Labor Relations Act, where facts *other* than the existence of an agreement between the parties would control the question of Simplot's statutory bargaining duties at Quincy vis-a-vis the Union.[13] It is thus evident that the

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that the decision of the arbitrator was in any way relevant to the disposition of the alleged statutory violations. (There was no suggestion, for example, that the decision gave birth to *statutory* rights on the Union's part – or duties on Simplot's part – which did not otherwise exist.) Third, the General Counsel made disclaimers at trial (penultimate footnote, supra) which simply cannot be cannot be [sic] harmonized with a subsequent claim that the arbitration deserves "deference" by the Board.

[13] It is reasonably clear from the cases, many of them discussed further in the next section, that the parties' statutory rights or duties, if any, following a plant shutdown and reopening at a new location, will have little or nothing to do with the existence or nonexistence of an *agreement* between them about the relocation and its labor relations consequences; rather, these rights or duties, if any, will turn instead on the existence or nonexistence of "sufficient continuity" between the two plants. *Harte & Co.*, 278 NLRB 947 (1986) (no violation to "extend" application of old plant contract to new plant, where "sufficient continuity" found); cf. *Hudson Berlind Corp.*, 203 NLRB 421 (1973), enfd. 494 F.2d 1200 (2d Cir.1974), cert. denied 419 U.S. 897 (violation found when employer recognized and contracted with Union A at new, "consolidated" operation, where consolidation involved "merger" of employees formerly represented by Union A *and* employees formerly represented by Union B, thereby creating "new" bargaining unit, and "real question concerning representation").

contract issues decided in the arbitration case and the statutory issues presented in the instant case lack any semblance of "parallelism"; therefore, the arbitration decision could not satisfy even *Olin*'s liberal tests for deferral.[14]

Findings and Preliminary Observations

I. Overview: The Parties' Contentions; *Harte*'s Teachings; My Conclusions

I have studied the whole record, including the parties' briefs and the authorities which they invoke. The

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[14] In *Olin*, the Board panel majority strongly criticized a number of prior decisions finding that *Spielberg*'s deferral tests were not met because of some failure on the arbitrator's part adequately to "consider" facts relevant to the statutory question, or to "apply" the relevant statutory tests. The *Olin* majority held instead (268 NLRB at 574, my emphasis) that henceforth it,

> . . . would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is *factually parallel* to the unfair labor practice issue and (2) the arbitrator was *presented generally with the facts relevant to resolving the unfair labor practice.* [fn. omitted] In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is 'clearly repugnant' to the Act. And, with regard to the inquiry into the 'clearly repugnant' standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is 'palpably wrong,' [fn. omitted] i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

facts, although somewhat complex in their relevant details,[15] are not in significant dispute, and the credibility of some of the witnesses will be matters for occasional comment only. The parties are in contest over which facts are important, how to characterize them, and over which legal authorities should properly control the analysis.

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[15] I directed the parties on the record at the trial's conclusion to take special pains on brief to identify with particularity (i.e., by "chapter and verse") the record source for any factual claims or characterizations they might make. Simplot's brief substantially conforms to this direction; the General Counsel's brief does not come close. Moreover, I cannot agree with the General Counsel when he announces at the start of his brief that "[f]actually, this is a very simple case." And I have not found his brief helpful in reaching my own fact-findings, largely because it suffers from lack of appropriate citation to the record. In other instances I have been mystified by some of his uncited claims about the state of the "record," which contradict what I have gleaned from presumably the same source. For example, he asserts, without attribution to the record (Br. at 10-11):

> [F]rom February through April 30, 1990, Respondent recognized the Union as the representative of its employees at the new facility. * * * It is a matter of record now that Respondent had to, and retroactively did, recognize the Union as the representative of the employees who were performing work in Quincy. . . .

But see paragraph 12 of the parties' Stipulation:

> Since a February 13, 1990 request by the Union, Simplot has refused and continues to refuse to recognize the Union as the representative of the Quincy Unit.

See also paragraphs 13 through 15 of the same central "record" document, in which Simplot stipulates that it did not bargain with the Union, but instead acted unilaterally in establishing all wages and other terms and conditions of employment of Quincy, and in doing so, departed from the status quo ante, i.e., from the terms and conditions established by the Wenatchee labor agreement.

The pleadings alone disclose a substantial number of undisputed facts: Simplot had historically recognized and dealt with the Union as the exclusive representative of year-round and seasonal production and maintenance (P&M) employees at its Wenatchee vegetable processing plant and associated cold storage warehouse. Simplot closed the Wenatchee plant on April 30, 1990, the date the Union's contract expired there, then "began operations" in "May 1990" at a new plant in Quincy ("approximately 28 miles" away, according to the complaint; about "35 miles," according to Simplot's answer; and about "30 miles," as the parties eventually stipulated). As of May 25, 1990, when Simplot conducted a "Grand Opening" ceremony at Quincy, its "Quincy Unit" workforce was composed of "a substantial number and/or a majority" of employees from the former "Wenatchee Unit."[16] Simplot has at all times refused to recognize and bargain with the Union as the exclusive representative of the P&M employees working at Quincy, and has acted unilaterally with respect to the Quincy employees' wages, hours, and other terms and conditions of their employment. Its unilateral actions resulted in departures from the wages and other terms and conditions of employment established for Wenatchee workers by the Wenatchee labor agreement.

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[16] Simplot's answers this by admitting that when it conducted the May 25 Grand Opening at Quincy, "the majority of the employees at the Quincy plant were employees who had worked . . . in the Wenatchee plant." In a subsequent Stipulation, Simplot clarifies that this "majority" refers to employees formerly in bargaining unit positions at Wenatchee who came to similar jobs within the putative Quincy bargaining unit.

While Simplot does not dispute these factual elements of the complaint, it denies the accuracy of the complaint's characterization of the Quincy plant as a "relocat[ion]" of the operations formerly done at the Wenatchee plant. Simplot's answer avers instead that the Quincy plant is an essentially "new" operation, a product of a decision by Simplot in "mid-1989" to "combine" and "expand" on the operations formerly done at three plants, Wenatchee being only one of them.[17] And Simplot posits as a matter of law that because Quincy is properly labeled as a "new" operation, the Union enjoys no special presumption that the employees at Quincy want the Union to represent them, no matter that a majority of them at one phase in Quincy's new operations were persons who had been represented by the Union when they worked at Wenatchee.

Simplot insists in any case that at all times it had a "good faith doubt as to the Union's continuing majority status" at Quincy. This defense, grounded in the "seasonal" variations in the plant's complement, apparently assumes for argument's sake that the existence of a Wenatchee transferee majority in the new Quincy complement would trigger a duty on Simplot's part to maintain

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[17] In its answer, Simplot avers (my emphasis):

> . . . in mid-1989 [Simplot] decided to combine its Wenatchee, Ferndale, *and Grandview,* Washington plants and expand its food processing operations at a new facility . . . in Quincy, Washington."

In its brief, acknowledging that the Grandview plant had been sold to a third party in 1986, Simplot has trimmed its claim, maintaining now that the "mid-1989" decision was to "combine" *two* plants, Wenatchee and Ferndale.

its bargaining relationship with the Union at the new plant. But if so, says Simplot, the "Wenatchee [transferee] majority" at Quincy as of May 25 is not meaningful, because the May 25 employee complement was only a "pre-season" complement, and one which was not "representative" of Simplot's expected complement at "full operations." And Simplot equates "full operations" with the peak phase of its fresh-harvest processing season, a roughly two-month period ending in late September, during which the Wenatchee transferees would temporarily become a minority, as the P&M complement became swollen with new hires, drawn mostly from a new locale, or "labor market." And it is with these peak season complement configurations in mind that Simplot also argues that to have recognized the Union at Quincy would have been "unlawful assistance," violating Section 8(a)(2) of the Act. As related legal support, Simplot cites the Board's established preference for holding representation elections in "seasonal" industries at or near the peak of the season, when the largest number of eligible voters can most easily participate in an on-site election.

Under the General Counsel's theory of prosecution, this case is generally governed by principles advanced in "relocation" precedents such as *Westwood Import*,[18] and *Marine Optical*,[19] principles which the Board adopted and

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[18] *Westwood Import Co.*, 251 NLRB 1213, 1214 (1980), enfd. 681 F.2d 664 (9th Cir. 1982); *General Extrusion Co.*, 121 NLRB 1165, 1167-1168 (1958); and *Marine Optical*, 255 NLRB 1241, 1245 (1981), enfd. 671 F.2d 11 (1st Cir. 1982).

[19] *Marine Optical, Inc.*, 255 NLRB 1241, 1245 (1981), enfd. 671 F.2d 11 (1st Cir. 1982).

refined more recently in *Harte & Co.*[20] I agree that *Harte*'s teachings properly bear on this case, and I think they are worth reviewing at the outset, even though there is a legitimate dispute about whether the term "relocation" adequately captures the relationship between the Quincy plant and the former Wenatchee plant,[21] and even though the "seasonality" of the operations here presents facts which *Harte* and its predecessors did not confront.

In *Harte*, an administrative law judge had found that a union and an employer in a relocation situation violated the rights of the new plant's employees when the union and employer agreed voluntarily to extend the old plant's current labor agreement to the employees at the new plant, without some independent, "uncoerced" showing that a majority of the employees at the new plant wanted the union to represent them.[22] In finding no violation and dismissing the complaint, the *Harte* Board construed the precedents – most of them cases where the employer was being prosecuted under Section 8(a)(5) for *refusing* to apply the old plant's union contract at the new plant – as teaching that a "mere" plant relocation will not defeat the

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[20] *Harte & Company, Inc.*, 278 NLRB 947 (1986).

[21] I acknowledge that *Harte*'s principles were declared in an "exclusively relocation" fact setting and therefore may play a less certain role in cases where the employer's new operation may be a product of plant mergers, or consolidations, or expansions, or combinations thereof. Cf. *Central Soya Co.*, 281 NLRB 1308, 1309, at fn. 6 (1986); *Hudson Berlind Corp.*, supra.

[22] Thus, as I see it, the *Harte* prosecution challenged not just the parties' agreement to continue the old plant's union contract at the new plant, but the very propriety of their continuing their relationship at all after the relocation.

continuing effectiveness of the existing agreement, provided that "sufficient continuity" between the old plant and the new plant may be found to "justify applying [the] existing agreement to [the] new location." Likewise echoing the precedents, the *Harte* Board reiterated that "sufficient continuity" is found where,

> the operations at the new facility are substantially the same as those at the old and . . . transferees from the old plant constitute a substantial percentage – approximately 40 percent more – of the new plant employee complement.[23]

Harte further instructs that the *time* for sampling the ratio of old plant transferees to new hires for purposes of a "continuity-of-complement" analysis is not necessarily when the new plant becomes "fully operational," but rather is the time when the employer's "relocation process" and the associated "employee transfer process" have become "substantially completed."[24]

Based on details which I narrate and comment on below, I will judge that the Quincy operation amounts to something more than a "mere relocation" of the Wenatchee operation to a new site, but that it amounts to something decidedly less than a "new" or "different" operation in terms of its business purpose, its production methods, and, most important, in terms of the people it has largely relied on to start and stay in operation.

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[23] 278 NLRB at 948-949, citing *Westwood Import*, and *Marine Optical*, supra, and *General Extrusion Co.*, 121 NLRB 1165, 1167-1168 (1958).

[24] Id. at 949-950, and cases cited.

Applying *Harte*'s principles to these unique facts, I will conclude that there existed at all relevant times, one of them being at "Grand Opening," a "sufficient continuity" of operations and employee complement between the Wenatchee plant and the new Quincy plant to support the General Counsel's ultimate claims. Thus, I shall conclude that Simplot violated Section 8(a)(5) and (1) of the Act, substantially as alleged in the complaint.

II. Details[25]

A. Background

Simplot, a Nevada corporation, headquartered in Boise, Idaho, operates food processing plants and related trucking businesses in several states, including Washington, California, and Iowa; its "Western Hemisphere" operations also include plants in Mexico and elsewhere in Central America. Simplot's main products are frozen fruits and vegetables, including potatoes. These are all

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[25] The pleadings, the exhibits, and the Stipulation of Facts entered into by the parties make up the framing for all of my findings above and below. I will rely for supplemental detail on the testimony of several Simplot officials: **Keith Fletcher,** the general manager of Simplot's corporate-level Fruit and Vegetable Division; **Diane Willingham** (nee Walker), who was at material times the "Human Resources Administration Administrator" for the same division, and who was on the "implementation team . . . put together to implement [the] plan" to close the Wenatchee plant and to build and staff the plant in Quincy; **Larry Shaw,** former Wenatchee plant manager and current Quincy plant manager, also on the planning and implementation team; and **John Stone,** the Quincy plant's personnel manager, who oversaw recruitment and hiring for the Quincy plant.

processed similarly at its plants, in two basic stages, "prime pack" – processing and freezing of fresh produce, done during the harvest season (usually called, simply, "the season"), and "repack" – removing frozen produce from bulk warehouse storage and packing it in customer-specified containers, done mostly outside the season. Prime pack and repack are distinct operations, relying on different production equipment and line setups.

We are concerned with what Simplot calls its "Northwest" vegetable operations, where the season typically runs for about four months, from approximately June 1 through the end of September. Simplot's Northwest operations have been concentrated since approximately April 30-May 1, 1990 in a single new plant in Quincy, Washington, the focus of this controversy. Simplot decided to centralize at Quincy a year earlier, in May 1989, at a time when its Northwest operations consisted of two Washington plants. One was a year-round prime pack and repack plant in Wenatchee, on the eastern slope of Washington's Cascade range, about 30 miles from the putative Quincy site, where the Union was the historically recognized representative of year-round and seasonal P&M employees, who were then covered by a labor agreement due to expire April 30, 1990. The other was (by May 1989) a prime pack-only plant in Ferndale, some 210 road miles West over the Cascades from Quincy, on Washington's Puget Sound coast, where P&M employees were represented by another Teamsters local union.

In the Northwest, Simplot followed patterns which are typical to the industry in Washington State,[26] ones which it continues to follow or intends to follow at the new Quincy plant: The plants perform prime pack throughout the June-October season; they typically do repack during all or a large part of the remaining 7-8 months of the year, and also perform repack at intervals during the season. Prime pack starts with pea varieties in early June, and grows in volume as new varieties of produce reach harvest point; it surges most strongly in September, when the inbound corn harvest overlaps with continuing inflow of other produce.

In a typical season, fresh produce is continuously trucked to the plant, and fed through a series of standard processes – inspection, culling, and blanching, then, depending on vegetable type and customer demand, peeling, trimming, slicing or dicing. The initially processed vegetables are then conveyed through "freeze tunnels," and, once frozen, are poured into bulk storage containers, called "totes." The totes are then transported

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[26] I rely in large part on the testimony of Simplot's Quincy personnel manager, Stone, for findings concerning Simplot's own employment patterns and practices at its Washington plants. Because Stone had wider industry experience, I also rely in part on his testimony for similar findings about the industry in general. My findings on these points are also informed by findings and descriptions in other cases arising in the same industry in the State of Washington, especially *D&K Frozen Foods, Inc.*, 293 NLRB 859, 862-63 (1989), and *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 676-77 (9th Cir. 1980), enfg. in part 237 NLRB 1450 (1978).

to an adjacent, functionally integrated cold-storage warehouse.[27] The warehoused products must eventually be "repacked," a process in which the loaded totes are returned from the warehouse to the plant and their contents are dumped onto packaging lines, where they are fed through pouring and packaging machinery into customer-specified containers, ranging from polyethylene bulk bags to brand-labelled wax cartons for the retail shelf. Repacked products are then transported to a shipping-staging area back in the cold storage warehouse, where they are assembled to customer order, and made ready for transfer across loading bays into waiting trucks or railcars.

The plants rely year-round on a fairly steady complement of P&M employees, a combination of "general labor" and "classified" workers with specialty jobs,[28] and their nonsupervisory leadpersons. During the season, the year-rounders function as a "core group" in each department and operation. During the remainder of the year, they are kept busy on repack work; they also maintain and repair prime pack machinery, and perform other get-

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[27] In some cases, the plant operator owns and/or operates the cold storage facility directly; in other cases, the plant operator will contract with a third party to perform cold storage services.

[28] "Classified" jobs include the following: Mechanics, electricians, and steam or power plant engineers, for installing, maintaining, and repairing plant systems and production machinery; operators for the processing lines and machines used during prime pack and repack; forklift operators; quality control technicians; shipping and receiving handlers and records-keepers.

ready work for the next season. They normally achieve year-round status by virtue of their experience and relative seniority. In fact, the plant operators, including Simplot, generally maintain a "seniority list," where date of original hire (usually carried over through successive plant owners) determines priority for retention at the end of the season, and for recall during the new season. The lists are updated periodically, to remove persons who are no longer "actively" interested in employment.[29]

Once the season starts, the core group is gradually supplemented by additional workers, especially in general labor classifications, with first preference given to waiting "active" seniority listees, in order of seniority. However, due mainly to roughly 40 percent turnover from season to season,[30] each new seasonal workforce will include many new faces. These are mostly untrained people, called-in from State Jobs Services registries when

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[29] In unionized plants, such as Wenatchee, the qualifications for inclusion on the seniority list, and the layoff and recall practices associated with it, are set forth in the labor agreement. Under the Wenatchee union contract, for example, an employee must have worked at least 1,400 hours in a preceding year's period to qualify for the list. The Wenatchee list included many employees with seniority dating back to initial employment many years earlier with a pre-Simplot operator of the plant.

[30] Quincy personnel manager Stone testified that plant operators in the industry, including Simplot, usually assume a "40 percent" turnover rate from one harvest season to the next. Given other indications that the year-round core group workforce is composed mostly of high-seniority employees, I presume that most of this turnover occurs among the persons hired for general labor work during each new prime pack season, with the likely result that turnover rates within that latter group substantially exceed the 40 percent figure.

the seniority list has been exhausted; they include students on summer break, and others whose situations leave them available for on-call work, as plant needs may require.[31] Employees in this outside, new-hire category may outnumber the "seniority" workers in the peak months of the season (they did, in fact, during Quincy's 1990 peak). And depending on how many hours these outsiders are willing and permitted to work during the season, they may themselves qualify for inclusion on the next updated seniority list, and thus have priority over other outsiders for available jobs in the next season, if they are still around, and interested.

B. The Quincy Plan

1. Its origin and main features

According to corporate general manager Fletcher, the May 1989 decision to house all future Northwest operations at Quincy was rooted in a "Four Corners" business strategy, originally developed in 1987, in consultation with the Simplot family, the principal corporate owners. Under this overall strategy, Simplot hoped to expand its

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[31] Plant manager/superintendent Shaw acknowledged, referring specifically to Quincy operations, that some of these seasonal new hires "work in the plant only for two or three weeks to a month every year," and are hired only for the "biggest production runs and at the peak of those runs[.]" He also acknowledged that partial layoffs may occur during the season, during a lull between harvests, or due to breakdowns in the processing lines. When this happens, seniority will govern who is to be laid off, and necessarily, the most recently hired summer extra workers will be the first targets for any such idling.

market share as a "low-cost" purveyor of frozen foodstuffs, and as well, to expand its range of products to serve emerging consumer preferences, by variously "strengthening" each geographic "corner" of Simplot's "Western Hemisphere" operations. The May 1989 decision comprehended these principal elements:

Within one year, the Quincy plant would be built and ready to take over all of the Northwest's prime pack and repack volumes; the start of the 1990 season would be the most critical readiness deadline. The Ferndale plant, by then equipped only for prime pack of certain produce, would be closed at the end of the 1989 season, then some four to five months away. Wenatchee, equipped as well for repack, would continue to operate for another 11-12 months, until the Quincy plant was ready to take over all operations.

Although Simplot had owned and operated the cold storage warehouse associated with the Wenatchee plant, it would instead use an independent cold storage company, Columbia Colstor, for these warehousing services at Quincy. Columbia would also take over operation of the Wenatchee warehouse, upon Simplot's exit, and Wenatchee's stockpiled frozen stores would continue indefinitely thereafter to feed Quincy's repack lines.[32]

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[32] Shaw's testimony at various points establishes the following related details: Columbia Colstor already operated a warehouse adjacent to the putative Quincy site; in fact, it had been used to handle overflow from the Wenatchee operation in the past. As part of the arrangement with Simplot, Columbia Colstor would "expand" this warehouse, and would purchase certain additional refrigeration equipment from Simplot. In

Quincy would be a substantially larger plant, containing four times more production floor space than at Wenatchee. With space for the running of extra lines, Quincy would process more volumes of product than either Wenatchee or Ferndale, or the two combined, had ever processed. The additional space would also allow the prime pack of some types of produce or foodstuffs which Wenatchee had not previously handled. Moreover, Quincy would be designed and equipped to meet USDA standards for handling of meat and other "protein" items, standards which Wenatchee (or Ferndale) could not meet without substantial upgrading.[33]

Quincy would require more employees than were required at Wenatchee (or at Ferndale, apparently[34]).

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addition, as part of Simplot's exit from Wenatchee, it either sold the Wenatchee cold storage warehouse to Columbia, or otherwise surrendered that operation to Columbia. Finally, Simplot had stockpiled substantial stores of frozen produce at the Wenatchee warehouse before exiting on April 30, 1990, and the Wenatchee warehouse (thereafter under Columbia's management) continued to feed the Quincy plant's repack operation for at least another year. Thus, Shaw acknowledged in April 1991, "The [frozen] product that we left at the Wenatchee facility when we left we've been slowly moving over."

[33] Here, Simplot contemplated blending frozen meat with vegetables, to produce a reheatable "stir-fry" product. In fact, however, no such processing had taken place as of April 1991, when this case was tried.

[34] The record does not show how large Ferndale's peak season employment complement may have been in 1989 or earlier, nor the size of its typical year-round crew in the era when it was also running repack. (As I explain below, Ferndale did not perform repack after late 1987; it therefore appears that Ferndale ceased to have a year-round crew as of late 1987.)

According to Willingham and Stone, the planners assumed that Quincy would need about 450 P&M workers at September peak,[35] compared to a Wenatchee peak complement of about 225, and would need between 150 and 200 for year-round work,[36] compared to an uncertain number of year-rounders typically used at Wenatchee, but perhaps close to 150.[37] As I will elaborate elsewhere, Quincy would draw heavily on the Wenatchee

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[35] In the event, Quincy used fewer – 431 – at its 1990 peak, as the parties stipulated.

[36] In fact, accordingly to Stone, Quincy employed 170-180 P&M workers in April 1991, before the 1991 seasonal influx of extra workers would begin. It thus appears that Quincy's year-round core group consists of about that same number of employees, 170-180, most of them Wenatchee transferees, as Stone also acknowledged.

[37] The closest attempt to get at the number of year-rounders typically employed at Wenatchee can be found in the General Counsel's examination of Stone, and the surrounding colloquy between counsel at Tr. 380-386, which focuses on whether the "144" Wenatchee transferees at Quincy as of a certain date were *all* formerly part of Wenatchee's year-round crew. Stone's testimony was inconclusive, and Simplot's counsel would stipulate only that when these eventual transferees were hired in April 1990, they were then "actively" on the Wenatchee seniority list, but not necessarily then working. But her explanatory remarks for so limiting her offer to stipulate make it appear that all of those "144" *would* have been working at Wenatchee in April 1990 were it not for the fact that Wenatchee's repack operation was then abnormally limited, because its repack equipment was being incrementally dismantled and reinstalled at Quincy. And if this is so, it is possible to infer that Wenatchee's year-round crew in more typical years included *at least* "144" workers.

employees to fill these bargaining unit "core-group" positions, and on the Wenatchee management team to manage the new operation.

2. Wenatchee's Dominant Status as of May 1989

The Quincy plan was arrived at only after Simplot had first considered alternative ways of "strengthening" its Northwest Corner, such as by enhancing Wenatchee's capabilities through renovations and expansions. That Wenatchee was an admitted alternative candidate as the central site for Simplot's future Northwest operations invites the conclusion that, in intention, the new plant would simply function as a beefed-up version of Wenatchee. But Fletcher's testimony tends to counter that impression; he stated that in deliberations before May 1989, the planners had considered beefing up at Wenatchee *and/or* Ferndale, to make either of those plants, or even the two in tandem, viable in terms of the Four Corners strategy. And Simplot relies on Fletcher's testimony to argue on brief that the decision to close Ferndale was likewise not made until May 1989, *simultaneously* with the decision to close Wenatchee.

This claim, and Fletcher's testimony, although ambiguous on the point, may be intended to imply that Ferndale and Wenatchee were each fully-functioning, independent plants, and therefore, the essence of Simplot's May 1989 decision was to "merge" or "consolidate"

two comparable operations. If so, I am not fully persuaded.[38] I have no doubt that Wenatchee was in live contention as a Four Corners base until May 1989, but I doubt that Ferndale occupied equal status as a contender after 1987, and I cannot in any event accept the idea that the two plants stood on equal footing in May 1989. To explain this requires a digression:

In the three years before May 1989, Simplot had already done a certain amount of plant-trimming and consolidating in its Northwest operations, apparently leaving Wenatchee by May 1989 as the dominant Northwest plant. Thus, until 1986, Simplot had run a third plant, in Grandview, also within the Union's territorial "jurisdiction," where Simplot had recognized and contracted with the Union as the representative of that plant's P&M employees, in a separate bargaining unit. And when Simplot withdrew from Grandview in 1986,[39]

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[38] The question is not so much whether Quincy reflects in part a "merger" of former operations – it clearly does – as it is to what extent, if at all, this merger is inconsistent with a finding of operational "continuity" as between Wenatchee and Quincy. And it is with the latter question in mind that I will make additional observations and findings about background details.

[39] Some related details are recited in *D&K Frozen Foods, Inc.*, supra, a case in which Simplot's successor at Grandview, D&K, was found to have unlawfully refused to recognize and bargain with the Union after its takeover at Grandview. A principal feature of D&K's violation was that it consciously bypassed former Simplot "seniority" workers for seasonal prime pack jobs, and instead recruited "outsiders" for the seasonal jobs, all as part of a "numbers-conscious" scheme to avoid having a peak complement composed of a "majority" of former Simplot workers.

It simultaneously shifted the volumes of corn and sugar snap pea processing formerly done at Grandview to the Wenatchee plant. Likewise (according to Shaw), Simplot transferred some of Grandview's physical equipment to Wenatchee, including its entire sugar snap pea processing line. This added to Wenatchee's existing prime pack and repack production volumes. Not long after that, by contrast, Ferndale's operations contracted, with Wenatchee taking on the volumes that Ferndale could no longer handle. Thus, in the "latter part" of 1987,[40] Simplot dismantled Ferndale's repack equipment and machinery, and shipped it to a new plant in Bettendorf, Iowa, the new site of Simplot's "Northeast Corner." Simultaneously, it transferred Ferndale's frozen repack stores to Wenatchee, and Wenatchee thereafter handled *all* of the Northwest's repack until Quincy took over.

As I understand Fletcher's overall account of the sequence of things, the dismantling of repack at Ferndale and the opening of the new plant in Iowa was one of the first moves made by Simplot to implement the Four Corners strategy. I doubt that Simplot would have stripped Ferndale's repack capability in late 1987 if expansion or other beefing up at Ferndale were then still a live option in the minds of its Four Corners implementation team. A more probable interpretation is that these late 1987 developments signalled a decision by that implementation team eventually to close the Ferndale plant entirely, even while the planners continued to actively consider the possibility of beefing up the Wenatchee plant and using *it*

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[40] Testimony of corporate Fruit and Vegetable Division General Manager Fletcher, at Tr. 89:8.

as its "Northwest Corner" plant. Accordingly, I am persuaded that the "mid-1989" decision to operate exclusively from Quincy in the future was not so much a decision to "combine" even to existing operations (that had been one goal of the Four Corners plan to start with) as it was a final decision not to use *Wenatchee* as the new site for such combined operations.

In any case, it seems obvious that Ferndale and Wenatchee did not function on equal footing after late 1987. Rather, Ferndale functioned from then until its post-season 1989 closure as an adjunct to Wenatchee, as a supplemental prime pack operation, with its bulk-frozen product going eventually to Wenatchee for repack. Thus, in the roughly 30-month period between the dismantling of Ferndale's repack operation in late 1987 and the opening of the Quincy plant in May 1990, Wenatchee functioned as Simplot's only year-round Northwest operation, the one handling all of the Northwest's repack volumes, and an apparently substantial part, if not the majority, of the Northwest summer prime pack volumes, as well. By contrast, during the same 30-month period, Ferndale's operations were intermittent, limited to the 1988 and 1989 June-October harvest seasons, a total of roughly 8-9 months.

3. The Question of "Animus"

The General Counsel does not allege in the complaint nor otherwise contend that Simplot was influenced in these decisions (first, to centralize Northwest operations; second, to centralize them at a site other than Wenatchee)

by a desire to escape collective bargaining obligations,[41] or by other union-hostile motives. Simplot's evidence fairly shows in any case that the Quincy decision was fundamentally "economic" in character – the Quincy site most directly fit with the Four Corners strategy; it was uniquely attractive in terms of available space for a larger-scale operation, and the local officials and agencies had offered many incentives and subsidies to defray costs of acquiring land, water and utilities, and waste treatment. My findings elsewhere below will show, however, that Simplot, having apparently chosen for "business" reasons to concentrate future Northwest operations at Quincy, admittedly announced a preference that the Quincy plant be operated on a nonunion basis, indeed, it declared to the Wenatchee employees five months before the move that Quincy would be a "non-union" plant.

C. The Transition

1. Simplot's Decision Not to Recognize the Union at Quincy

The Union was somehow made aware in or shortly after May 1989 of Simplot's decisions, and the Union thereafter made various efforts to gain information from

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[41] Fletcher testified without contradiction that "labor costs" at Wenatchee (or Ferndale) were not a factor in the decision to concentrate Northwest Corner operations at a new plant; he explained that while Simplot hoped to achieve economies of scale at Quincy – and thereby reduced labor costs per produced unit – Simplot projected its wage and benefit costs per hour per employee at Quincy using the costs established by the labor agreements at Wenatchee and Ferndale.

Simplot about the intended timing and other implementation details, without directly asserting a right to be recognized in the new operation until mid-February 1990. During much of that same period, Simplot's planners themselves appear to have been uncertain as to the Union's possible status at Quincy. Thus, Willingham admits that it was not until "January," 1990, with Quincy construction on schedule, that Simplot's "implementation team" made a "final determination" that Simplot would *not* treat the Union as the representative of the Quincy employees. And this decision apparently went hand-in-hand with Simplot's admitted, near-simultaneous promulgation on a unilateral basis in January of wage and benefit schemes, and other terms and conditions of employment to be applied in the Quincy operation.

The parties stipulated that it was not until mid-February that Simplot disclosed its intention not to carry over recognition to the Union at Quincy.[42] Until that point, it seems, Simplot had merely disputed the Union's claims under the Wenatchee contract's "transfer" provisions that the "terms and conditions" of the Wenatchee

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[42] Thus, the parties stipulated that "[s]ince a February 13, 1990 request by the Union, Simplot has refused . . . to recognize the Union as the representative of the Quincy Unit." The "February 13 request" by the Union is apparently how the parties have mutually chosen to construe a more substantively complex *set* of letters from the Union's attorney to Willingham (Joint Exhs. 3 and 4), both dated February 13. In one, the Union asserted a contractual grievance under the Wenatchee contract's "transfer of operations" provisions (quoted supra, at fn. 1); in the other, the Union requested detailed information about Simplot's actions and intentions concerning Quincy.

labor agreement would continue to govern at Quincy.[43] But a decision not to recognize the Union at all at Quincy was implicit in other communications in January between Simplot and the Wenatchee employees. Thus, in January, Simplot posted information bulletins in the Wenatchee plant, setting forth pay classifications and benefit programs for "non-union hourly employee[s]" at Quincy, which benefits were characterized as "similar to that provided at other non-union facilities of the Simplot Food Group." Moreover, when she addressed a meeting of Wenatchee unit employees on February 14, 1990, one attended by representatives of the Union, Willingham told the assembly, inter alia, that the Quincy plant would be "nonunion," that the company was not recognizing the current Wenatchee labor agreement as being "applicable," and that Simplot "wants to have a direct relationship with employees without a third party."[44]

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[43] Thus, in a January 10, 1990 letter from Willingham to a then-acting spokesman for the Union, Jerry Shuffield, Willingham noted that the current Wenatchee labor agreement "will expire on April 30," and that "the Company will no longer have employees working in that facility . . . ," and therefore, that "we intend to let the agreement expire in its entirety." Willingham continued, "Employees who are currently working at Wenatchee and Ferndale . . . have been offered work at the Company's Quincy facility, which will not be covered by any pre-existing labor agreements."

[44] I rely here on the uncontradicted testimony of the Union's agent, Allen Hobart, and, where his independent memory failed him, on the contemporaneous notes (G.C. Exh. 3) which he took at the meeting where Willingham spoke to Wenatchee employees about the company's plans for Quincy. Incidentally, Willingham's declarations to Wenatchee employees that Simplot wanted and intended to run Quincy as a

Willingham was called on at trial to articulate the "reasons" for the planner's decision *in January* not to recognize the Union at Quincy, a decision which she acknowledged was guided by legal counsel. Predictably, her testimony echoed positions set forth in Simplot's answer to the complaint, and focused on Simplot's expectation that the peak season complement at Quincy would be roughly twice that at Wenatchee, and would come mostly from a different locale. I will reserve most of my discussion of these points to later sections. However, I pause here to comment on Willingham's additional assertion that Simplot's planners had no idea in January that recruitment efforts among the Wenatchee employees would result in significant numbers of Wenatchee employees being willing to accept positions at Quincy: I accept that Simplot could not know with clarity *which* of its Wenatchee employees would accept positions at Quincy, until after it had sought them out, which Stone admittedly waited until "mid-April" to do, with substantial success, as I detail in the next section. But I assume

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"nonunion" plant are not alleged in the complaint as violations of Section 8(a)(1), and the General Counsel does not otherwise claim that they were unlawful. But see, *Kessel Food Markets, Inc.*, 287 NLRB 426 (1987), holding that, at least in a successorship context,

> When an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to applicants that it intends to discriminate against the seller's employees to ensure its nonunion status. Thus, such statements are coercive and violate Section 8(a)(1). [Id. at 428-429; cits. omitted].

See also, e.g., *D&K Frozen Foods*, supra, 293 NLRB at 873-874.

that Simplot would not have waited until mid-April to start this process if its planners had been entertaining serious doubts during the preceding months about the success of such recruiting. For Simplot had millions riding on the new plant, and ground had already been broken and construction was well underway even in January. And it is hard to believe that Simplot would have committed to that level of investment without having *first* satisfied itself that substantial numbers of the Wenatchee workers (comprising the only nearby, large-scale source of experienced personnel) could be induced to staff the Quincy plant's intended 150-200 core group positions. Therefore, I do not believe Willingham insofar as she claims that one of Simplot's reasons for deciding in January not to recognize the Union at Quincy was a "doubt" that Simplot would be successful in recruiting *most* of the "active" Wenatchee employees.[45]

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[45] I am equally unimpressed with a corollary point urged by Simplot, relying on Willingham: Willingham stressed that the Union never "guaranteed" that the Wenatchee employees would take employment at Quincy. This lack of a "union guarantee" strikes me as a red herring: Willingham soon admitted that Simplot never sought the Union's assistance in recruiting Wenatchee employees for the Quincy plant, much less its "guarantee" that substantial numbers would make the move. Moreover, considering Simplot's determination not to recognize the Union at Quincy, I doubt profoundly that Simplot would wish to have the Union involved in any way in matters pertaining to Quincy staffing, much less to serve as a labor broker for the Quincy operation.

3. Hiring Process for Quincy

Personnel manager Stone admits that Simplot's planners looked to the "active" employees on the Wenatchee seniority list, most of them residents in the greater Wenatchee community, as the most likely and the best candidates for jobs at Quincy.[46] Stone began hiring for Quincy jobs in mid-April, using facilities at the Wenatchee Convention Center to meet with Wenatchee unit employees, answer their questions, and receive written applications from them. As part of its recruitment campaign, Simplot distributed identical letters to Wenatchee unit employees on April 18, along with a packet of informational materials concerning "policies and programs" for the Quincy operation.[47] The form

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[46] Employees from the distant Ferndale plant were not seen as a likely source for filling these positions, although Stone "hazard[ed] a guess" that "16" former Ferndale workers eventually relocated from across the mountains and took jobs at Quincy. I note in this regard that, unlike Wenatchee transferees to Quincy, any former Ferndale employees who came to work at Quincy could not have been considered by Simplot as "active" Simplot employees at the time they were hired for the Quincy operation. This is because the Ferndale plant had shut down for the last time at the end of the 1989 prime pack season, roughly 5-6 months before interviewing and hiring began for the Quincy operation.

[47] Jt. Exh. 7-A, p. 12. This publication was issued was [sic] during the same period that Quincy's personnel director, Stone, was conducting interviews among the Wenatchee workers for hire at Quincy.

letter, signed by members of the "Simplot Management Staff,"[48] stated pertinently:

> We are closing an old facility and opening a new plant in Quincy. We've been trying to paint a picture of the kind of workplace we can have in Quincy. . . .
>
> The plant will be among the biggest and best of its kind. We're in this for the long run, and we need the partnership of trained and talented workers like you. We hope you see how hard we're working to hear your ideas. We hope you see our willingness to share information, power and profits.
>
> Quincy will truly be a workplace all of us can be proud of. Come be partners with us. Come make Quincy WORK.

As a consequence of these and other recruitment blandishments,[49] Stone received applications in mid-April from "probably 150, 160" (Stone) active Wenatchee seniority listees, and hired virtually all of them. It seems obvious that Simplot intended that employees from this

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[48] The letter was signed by 17 newly-hired Quincy supervisors and managers, nearly all of whom had come from counterpart positions at Wenatchee, and some of whom were then still working at Wenatchee, or were dividing their time between Wenatchee and Quincy.

[49] Simplot made it simpler for former Wenatchee employees to make the daily commute to Quincy by arranging bus and van pool systems, which carried workers between Wenatchee and Quincy throughout the 1990 season. And when it hired the former Wenatchee workers, it credited them for seniority purposes with their original dates of hire at Wenatchee.

active Wenatchee pool (apparently totalling about 177 seniority listees[50]) would fill the majority of the projected 150-200 year-round positions available at Quincy.[51] It seems equally obvious that Simplot had assured itself by mid-April that Quincy's year-round unit workforce could be staffed primarily with experienced former Wenatchee employees. And it was only after having thus secured a core complement that Simplot turned its efforts to recruiting at the Quincy Jobs Services Center for the extra help it would need during the 1990 season.[52]

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[50] As already noted, the record does not clearly show the number of year-round employees typically used by Simplot at Wenatchee, but Willingham testified that it was her "understanding" that "the maximum number of people [potentially available in the Wenatchee unit for hiring at Quincy] was about 177 if we could pull everybody."

[51] The text of the April 18 recruitment letter, supra (" . . . we need the partnership of trained and talented workers like you") seems alone to establish the point. And Stone admits that former Wenatchee seniority listees continue to make up the majority of Quincy's year-round P&M complement, apparently totalling 170-180 employees.

[52] Simplot's reasons for largely limiting its supplemental recruitment efforts to the Quincy area are not directly challenged by the prosecution as having been part of some overall discrimination scheme, and I could not so find in any case, given these undisputed facts: Wenatchee is the largest city in Chelan County, and is the hub for processing apples grown on the eastern slope of the Cascades. Stone testified that Simplot's Wenatchee plant typically "competed" for general labor workers during summer harvest season with the apple processing plants in the same community. Quincy is a small town in Grant County, a decidedly more rural area. And even though Quincy is only about 30 miles from Wenatchee, Simplot's planners apparently assumed that this distance alone would discourage summer job seekers living in the Wenatchee area from

3. The Use of Wenatchee Mechanics at Quincy During the Term of the Wenatchee Labor Agreement

Starting as early as July 1989, and continuing through December 1989, Simplot had begun to dismantle certain of Wenatchee's prime pack equipment, as it was no longer needed during the Wenatchee prime pack season, with the intention of gradually reinstalling all or most of it at the Quincy site. It similarly dismantled some of the remaining usable prime pack machinery at Ferndale, intending to use it at Quincy. It began also to dismantle Wenatchee's repack machinery and stage it at Quincy for installation. Simplot also acquired some new equipment, described elsewhere below, never before used in any of its former Northwest plants.

Associated with this, in February, Simplot assigned three Wenatchee unit mechanics to begin the reassembly and reinstallation at Quincy of the transferred and new equipment. These mechanics, augmented by additional mechanics from elsewhere, continued such work throughout March and April,[53] and for an indefinite period thereafter. And even though the Wenatchee labor agreement was effective during the period that much of

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traveling the additional distance to Quincy, particularly when the Wenatchee apple plants would offer comparable summer processing work.

[53] The parties' Stipulation shows that on April 1, when the Quincy "unit" apparently consisted only of mechanics doing equipment installation, three of the five unit employees were from the Wenatchee unit.

this reinstallation was going on, Simplot did not pay any of the Wenatchee unit mechanics working at Quincy according to the Wenatchee labor agreement; instead it paid them according to the new pay and classification schemes developed unilaterally for Quincy by Simplot's planners in January.

D. Quincy's Staffing and Operational Status in May 1990; the Question of its "Completeness"

Bargaining Unit Complement: Wenatchee transferees dominated the Quincy unit throughout the month of May. According to the parties' Stipulation, on May 1, the day after the Wenatchee plant formally closed, Simplot employed a P&M unit complement at Quincy of 67 persons, 55 of them Wenatchee transferees, yielding a "transferee:new-hire" ratio of 55:12. Although the precise ratio on the May 25 Grand Opening date is not of record, it can be roughly interpolated from the parties' Stipulation, which shows that the ratio was nearly 3:1 (81:32) on May 15, and roughly 1.5:1 (84:55) on May 31.

Management Team Complement: The parties stipulated that all former Wenatchee supervisors and managers took supervisory or managerial positions at Quincy, and that all of them already occupied status as part of the Quincy management team "in May 1990 or earlier."[54]

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[54] At least this is how I decipher the following passage in the parties' Stipulation:

> All supervisors (as defined by Section 2(11) of the . . . Act) and managers, who at the time of its April 30,

These included plant manager/superintendent Larry Shaw and nearly all of the divisional managers and day and night shift supervisors formerly associated with production and maintenance work at Wenatchee.[55] These Wenatchee "management transferees" comprised a majority of Quincy's management team throughout May (and, so far as this record shows, at all times thereafter). Thus, whatever else may be said about the "completeness" of Quincy as of May 25, it seems reasonably clear that Quincy's management team was fully in-place by that date, and that it was dominated by former Wenatchee managers and supervisors.

Operations: Quincy began performing repack operations on an uncertain date in early May. I infer that it was relying exclusively at that stage on frozen product

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1990 closure, were employed at the Wenatchee facility were in May 1990 or earlier employed as supervisors and managers at the Quincy facility.

[55] Counting Shaw, Quincy's management team responsible for production and maintenance work consisted of 10 persons (Resp. Exh. 4), 7 of whom came from the Wenatchee plant, most of these latter from counterpart positions. The three non-Wenatchee members of the team included Steve Bates, formerly the "Production Manager" at Ferndale, who took the same position at Quincy, Linda Pennington, newly-hired as "Night Superintendent," and Craig Riley, formerly at Ferndale, hired as Quincy's "Plant Sanitarian." I note also that personnel manager Stone, who came from Simplot's Santa Maria, California divisional headquarters, was a somewhat "new" management face to the transferred Wenatchee workers, although Stone had performed extended personnel duty at Wenatchee during the 1989 season.

transported from the Wenatchee warehouse.[56] I find from Shaw that reinstallation of the repack lines – all from Wenatchee – had been a "first priority,"[57] and that such reinstallation had been substantially "completed" by no later than May 25, the date of the "Grand Opening" ceremonies at Quincy.[58] I infer, moreover, that the repack

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[56] I recall Shaw's testimony that stores of frozen product from the Wenatchee warehouse (now operated by Columbia Colstor) continued to be fed into the Quincy repack operation for at least a year after Quincy opened. And it is obvious that Quincy itself could not have been producing any frozen product of its own in May 1990, for freezing is associated with prime pack, and the 1990 prime pack season had not yet begun.

[57] Noting that "ground-breaking" for construction of the Quincy plant did not occur until "November" 1989, Shaw summarized the planners' priorities in the following terms (my emphasis):

> . . . we were set to start this facility on prime pack in June of the following year. That didn't leave us a lot of time to do this. Our plan . . . was basically to be working [on construction] even at the point that we were running [production]. So we prioritized the lines so that we would have them ready by prime, *and we looked at our repack operation so that at first we could take over [to Quincy] the [repack] lines and get them involved,* try to set them up, that wouldn't hurt us to have them down to begin with. *So the first area that we concentrated on was to try to get some of the repack equipment over and inside the shell and get them anchored down.*

[58] Discussing the status of the repack operation as of May 25, and using a plant diagram for reference, Shaw said, "That's basically everything to the right of where you see that staircase catwalk right under the word 'repack.' That was all complete." Indeed, I would infer that Quincy's repack operation had been substantially up and running since on or shortly after May 1. This would have been logically part of Simplot's closely-

operation was substantially "complete" in another sense by May 25 – that it was performing at substantially the same scale and volume expected of it during comparable off-season periods in years to come.[59]

It is less certain on this record how to characterize Quincy's completeness as a prime pack operation on May 25. Simplot emphasizes Shaw's testimony that some equipment needed for the prime pack of later-season produce was not yet fully installed by that date, and that such equipment continued to be incrementally installed for about another month thereafter. Shaw acknowledged,

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coordinated Wenatchee shutdown-Quincy opening plan: Thus, Shaw admitted that reinstallation at Quincy of repack equipment stripped from the Wenatchee plant was a "first priority," and we may presume that Simplot would not want to experience any substantial "discontinuity" of Northwest repack operations after Wenatchee's April 30 closing. Moreover, Simplot made no showing that Quincy repack operations were *not* complete *until* May 25.

[59] The complement breakdown data in the Stipulation reveal that on May 31, only a few days after Grand Opening, when Quincy was doing repack only, the total number of bargaining unit employees then working was 139 (a majority of whom were Wenatchee unit transferees). This total amounts to roughly 80 percent of the approximate total complement (170-180) listed by Stone as currently working in bargaining unit positions about a year later, in mid-April 1991, when this case was tried, and when repack was presumably the sole operation in the plant, and was presumably going at full steam. Assuming a rough correlation between size of complement and level of production in comparable annual repack periods, I therefore infer that at Grand Opening time in late May 1990, Quincy was producing at roughly 80 percent of its eventual repack capacity. In short, in May 1989 Quincy was "substantially" in "full operation," considering the time of year.

however, that by May 25, the equipment necessary to prime pack green peas and sugar snap peas was already in place, and within only a few hours of final tinkering and shaking down before being ready to handle a harvest influx of these early-season vegetables.[60] In fact, the Grand Opening ceremonies were held at a prime pack processing line, where green peas were undergoing a demonstration run, even while repack was apparently being conducted simultaneously on the plant's packaging lines.

Simplot strains, I think, in trying to harmonize its choice to hold "Grand Opening" ceremonies on May 25 with its claim in this litigation that Quincy was not "complete" (i.e., in "full operation") until months later, at the peak of the season. Simplot's counsel asserts on brief that this "[May 25] date was not supposed to signify completion of the new operation."[61] What, then was this date "supposed to signify?" Counsel does not distinctly reply, but she would apparently characterize the May 25 timing as a rather arbitrary choice on the company's part for a Grand Opening date, or at least one which was dictated by considerations unrelated to Quincy's "completeness" by that date. Thus, she cites Shaw's testimony that the timing of ceremonies was in part influenced by the schedules of attending members of the Simplot family, and by the fact that it would have been impractical to conduct any such ceremonies after June 1, when the first pea

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[60] Shaw also implies that the "cob [corn] line" was basically ready by May 25 to handle corn, even though corn would not come in until later.

[61] Simplot Br. at 16.

harvest was expected, apparently because prime pack is a relatively more frenzied and overwhelming production operation, leaving little time for any plant personnel to pause for ceremony, and little floor space on which to conduct it.

However true both points may be, they sound only weakly against Shaw's admissions in the same passages of testimony relied on by Simplot, where Shaw clearly indicates that operational "completeness" was a major factor in Simplot's decision to hold Grand Opening ceremonies on May 25. Thus, Shaw stated,

> . . . we wanted as much as the plant completed as we could possibly have completed, but . . . we didn't want it [Grand Opening] to happen while we were actually prime processing. We could not have people walking through the facility when we were running vegetables, so we scheduled it for the 25th of May assuming that any time after the 25th of the [sic] May we could be running sugar snap peas or green peas. That was the latest date that we could foresee out.

I recall also that Shaw declared that the ultimate company goal for Quincy was that it be "ready by prime," and that, by May 25, Quincy was indeed "ready" to prime pack pea varieties, should the harvest come early. Thus, I am not persuaded that it was merely arbitrary for Simplot to have chosen late May as a point to declare a "Grand Opening." From all appearances, Quincy was by that point as "ready" from an *operational* standpoint as it needed to be, not just ready to continue repack, but ready as well to switch to prime pack operations as soon as the season were to start with the pea harvest.

E. Quincy's Status During and In the Aftermath of the 1990 Season

Complement: Recapping earlier findings, Simplot's efforts to encourage former Wenatchee employees to take jobs at Quincy eventually resulted in the hire of roughly 150-160 "active" employees from the Wenatchee P&M unit, although, due to intervening "resignations" and "injuries," no more that 148 former Wenatchee unit employees ever ended up working at Quincy at any given point. Moreover, the former Wenatchee unit employees who came to Quincy, although hired for Quincy in April, actually became employed gradually in the new operation (84 by May 31; 148 by August 15). During the same period, Quincy was also bringing in increasing numbers of new hires, most of them referred through the local Jobs Services Center.[62]

Wenatchee transferees had dominated the Quincy complement throughout May. They continued to be a substantial majority for about two more months, until an uncertain point – probably shortly before August 1, when

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[62] According to Stone, some of the extra seasonal workers hired through the Quincy Jobs Service Center were actually Wenatchee area residents who had been referred from the Wenatchee Job Service Center, but most of these extra workers were residents of the Quincy area, or were residents of other Grant County rural communities, such as Ephrata and Moses Lake. In prior seasons in Wenatchee, says Stone, only a few seasonal workers had come from these Grant County communities.

new hires became the majority.[63] I note, however, that even as late as August 1, the number of Wenatchee transferees then on board (146) still qualified as a "substantial percentage," as *Harte* defines this expression, of the total Quincy complement (368).[64] But even this "substantial percentage" status diminished to something less substantial during the next two months of the season, when Wenatchee transferees became an ever-dwindling minority, with the heaviest dilution of their presence occurring on September 30, when the complement peaked at 431, and only 135 of the unit employees, roughly one-third, were Wenatchee transferees.

After the 1990 seasonal bulge subsided, the unit workforce returned to a core complement of about 170-180 employees for the remaining 7-8 months until the start of the next season. The majority in that core group again were Wenatchee transferees.[65]

Operations: As I have found, Quincy had been ready for prime pack of pea varieties no later than May 25, all

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[63] On June 15, after prime pack had begun in earnest, the Wenatchee Transferee: New Hire ratio was 133:50. On June 30, the ratio was 140:129. On July 15 the ratio was 144:113. On the next date recorded in the Stipulation, however, August 1, the ratio became 146:222.

[64] The 146 Wenatchee transferees at Quincy on August 1 comprised 39.7 percent of the total complement of 368. *Harte* equates "substantial" with "*approximately* 40 percent or more." 39.7 percent is "approximately" (i.e., three-tenths of one percent short of) "40 percent."

[65] I rely on the summary testimony of Stone on this point; the parties' Stipulation does not include any specific complement numbers or ratios after September 30.

pursuant to what Shaw described as general plan to "prioritiz[e] the lines so that we would have them ready by prime." Actual prime pack of peas began in early June, even while further equipment required for the prime pack of varieties to come later was also being installed. So far as this record shows, these additional installations were accomplished on schedule, in time to handle each new harvest. Thus, it appears that *at any given stage* in its initial prime pack season, the Quincy plant was capable of performing – and was performing – the same range and scale of operations which such plants typically perform at that given stage, indeed, substantially the same range and scale of production which Simplot intended Quincy would handle at that stage in years to come.

F. Miscellany

We are instructed by such precedents as *Harte & Co.*, supra, to test for indicators of "continuity" (or "discontinuity") between "old" and "new" plant operations as one ingredient of the determination whether a union representing employees at the old plant is entitled to continuing recognition as the bargaining agent for employees at the new plant. It is by now plain that the Quincy plant is larger than the Wenatchee plant, and uses nearly twice as many employees at *seasonal peak* than did the Wenatchee plant.[66] That Quincy is thus "bigger" than

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[66] Based on earlier findings and inferences, however, it is reasonably clear that Quincy's year-round complement needs did not double in comparison to Wenatchee's (uncertain) year-round complement. Quincy used about 170-180 year-rounders; Wenatchee may have used upwards of 150.

Wenatchee is the most obvious difference between the two plants. That Simplot continues at Quincy to prime pack and repack vegetables – mostly the same varieties that Wenatchee had also processed, as I discuss below – and has relied heavily on former Wenatchee unit employees and supervisors and managers to accomplish these functions, are perhaps the most obvious indicators of similarity, or "continuity."

In the end, I will find the latter considerations more influential than Quincy's "bigness" in finding the requisite continuity. But I must acknowledge that Simplot's "new plant" defense does not rest simply on Quincy's relatively larger size; Simplot also invokes a variety of other arguable novelties in Quincy's operation as facts tending to show that Quincy is not just bigger than Wenatchee, but is essentially different in nature from the Wenatchee operation. Here I will address these additional factors under somewhat arbitrary category headings, and will explain why I am not persuaded to Simplot's conclusion.

Bargaining Unit Work: The parties stipulated that,

> All jobs included in the job classifications [specified in the Union's contract at Wenatchee] . . . are now performed in the Quincy plant, except for the following:
>
> Cold Storage Warehouse Foreman
> Senior Cold Storage Lift Truck Operator
> Junior Cold Storage and Carloading
> Processing Foreman
> The primary reason for the elimination of these positions is that Simplot does not operate a cold storage facility at Quincy. Lift trucks are still

> operated at Quincy and there are employee positions at Quincy which incorporate lift truck operation, carloading functions, and foreman responsibilities and duties.

Simplot "reserved the right" in this portion of the stipulation to "demonstrate that there are additional classifications, duties, responsibilities, and/or jobs at Quincy which did not exist at the Wenatchee facility or that have been substantially changed from the job at the Wenatchee plant."

Simplot's eventual proof on these points is scattered; I will treat with some of the elements elsewhere [sic]. But it includes testimony – mostly Shaw's – that an uncertain, but apparently small, number of employees now perform tasks in addition to those they performed in counterpart jobs at Wenatchee, and also that certain tasks performed as part of one job at Wenatchee are now being handled as part of a different job at Quincy. Most of the evidence associated with these points bears on changes in the way quality control is handled at Quincy, where Simplot has sought to implement a "concept" called the "Total Quality System," or "TQS," under which production machinery operators and even line personnel are supposedly given greater responsibility than at Wenatchee for ensuring the quality of the product at their respective stages in the production process.

The realignments and adjustments associated with the implementation of the TQS philosophy were not shown to have significantly altered the traditional functions or basic work tasks of any given group or classification of employees. Moreover, these changes were not

shown to have been necessitated by some inherent "difference" between the Wenatchee and Quincy plant operations; rather, they were changes which Simplot admittedly had chosen not to try to impose at Wenatchee, apparently because Simplot did not want to undergo necessary bargaining with the Union about them. To that extent, it involves a form of bootstrapping for Simplot to invoke those very unilateral changes as a defense to the charge that it had had no right to act unilaterally in the first instance.[67]

As the parties stipulated, Simplot no longer employs persons working in the cold storage warehouse; rather, these positions are now occupied by employees of Columbia Colstor. Relatedly, Simplot points out that plant forklift drivers no longer transfer product in totes from the plant floor to the warehouse; rather, the toted product is conveyed on belts through an opening from the plant into the warehouse, where Columbia Colstor employees handle the stacking and storing of the totes. I note that such changes affected the daily jobs of only a relative few employees, and did not eliminate the need for plant forklift operators. Clearly, in any event, these changes did not transform the overall "nature" of the traditional operation.

Products: The Wenatchee plant did prime pack of sugar snap peas, corn (cut and cob), and carrots. The Quincy plant prime packs not only those produce items, but also green peas and red potatoes (both prime packed

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[67] Cf. *Stewart Granite Enterprises*, 255 NLRB 569 (1981), at 571 (first full para.), and 574 (ditto).

only at Ferndale in prior seasons), and two new items never prime packed at either Wenatchee or Ferndale, lima beans and red russet potatoes. (Wenatchee had handled lima beans and red potatoes, but only as "blended" repack items)[.] In repack, the principal difference between the two plants' product lines appears to be that, unlike at Wenatchee, Quincy blends pasta with other vegetable blends. (Wenatchee had blended some vegetables, but not vegetables and pasta). Moreover, Simplot intends eventually to blend vegetable and meat products into "stir-fry" meals. But as I have already noted, it had not yet done any such blending at the time of this litigation, nearly a year after Quincy first opened. In any case, the introduction of new produce items or blends was not shown to have itself created any job classifications not in existence at Wenatchee, nor any changes in the basic way prime pack and repack of a more limited range of produce varieties was handled at Wenatchee.

Equipment: Simplot's premise is that a substantial amount of "new equipment" is a factor which supports "good faith doubt." I think this involves a confusion of concepts at the outset, and is not well supported by the authority it cites.[68] But I will treat the facts as arguably

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[68] Simplot cites *American Fluorescent Corp.*, 275 NLRB 1097 (1985) for this proposition (Br. at 27). I think Simplot relies on a dubious interpretation of the judge's rationale, which the Board in any case failed to adopt. Thus, the judge in *American Fluorescent* construed *Westwood* and other precedents as requiring a transferee "majority" at some point at or near the "commencement of new operations." Id. at 1101 (last para.)-1102. And he found no such "majority" at any point in the new plant's operations, which was dispositive in his recommended dismissal of

going to the question whether Quincy is so "different" in "nature" from Wenatchee that it is, indeed, a "new" plant, where the Union would enjoy no presumption of majority status in the first instance, and therefore Simplot would never be required to present evidence supporting "good faith doubt" to rebut the (nonexistent) presumption.

Quincy plant manager Shaw, who held the same job at Wenatchee, testified somewhat unsystematically concerning the origin of the equipment used at Quincy. He concedes that virtually all of Wenatchee's repack equipment was relocated to Quincy, with the exception of a "Haysen" (polyethylene packaging) line, which was replaced by a newer model; he described only one "change" in the way repack is now being done at Quincy, and this change does not appear to have affected how the repack workers have always performed their jobs. (Summarizing, Shaw stated: "It's basically the same packaging equipment. It['s] just laid out that we can run it at the same time."[69])

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the complaint. But the Board found it "unnecessary" to affirm this reading of *Westwood's* " 'substantial' number" test, apparently because the evidence showed in any case that the number of "old" plant workers transferring to American Fluorescent's new plant amounted to less even than a "substantial" percentage of the new plant complement. The ultimate decision, therefore, had nothing to do with the importation of some "new equipment" into the new plant.

[69] This is what Shaw said in greater detail in response to a question from the bench:

JUDGE NELSON: Again, if this can be done more simply, I'd appreciate it. I'd like to ask the question a different way. What operations do you have at Quincy that you did not have at

Shaw is less clear in describing how much of Wenatchee's prime pack equipment likewise made the move. He acknowledges that Wenatchee's steam blanchers and sugar snap pea line were transferred, and also portions of the freezer lines, and some carrot budding saws and other fresh-processing equipment. In these cases, however, Shaw appears to say that the Wenatchee equipment was first cannibalized, and to some uncertain degree reassembled or reconfigured with additional new parts or elements, such as wholly new, stainless steel roller conveyors, apparently required for USDA "protein"-handling certification.[70] Many of the forklift vehicles likewise came from Wenatchee, says Shaw, although

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Wenatchee? I think I can search his answer and come up with that and compare it to other data, but if you can put it that way, I'd appreciate it.

THE WITNESS: The equipment in the repack, about the only difference is in how the equipment is set up. When we set up the repack in Quincy, it was – it went from a system that went from one mix and blend room with the dumpers that fed the lines out to a system where all of the lines in Quincy are totally independent. They have their own dump stations behind each line, meaning that in Quincy we can run the lines independent of each other at the same time. Whereas in Wenatchee, if it didn't work out quite right with the one mix and blend system, we were limited on what we could run at one time down on the floor. That's the major difference. As far as in answer to your question, what additional equipment we have in Wenatchee or, excuse me, in Quincy, it's basically the same packaging equipment. It just laid out that we can run it at the same time [sic].

JUDGE NELSON: Thank you.

BY MS. ANAMOSA:

Q It's the same equipment except for the Haysen –

A And the Haysen

[70] It appears also that some Wenatchee warehouse refrigeration equipment likewise made the move to Quincy. Thus,

"some" of them, especially fitted for work in the Wenatchee warehouse, were "left" at Wenatchee. This presumably means that these custom forklifts were sold to Columbia Colstor, apparently to be used as they had been historically, including to move frozen product destined for Simplot's repack lines, now relocated to Quincy).

Shaw was led more systematically to itemize the "new" equipment used at Quincy: Although some steam blanchers had come from Wenatchee, an additional cabin plant blancher ("the largest one in existence") was imported from a European manufacturer. It was not shown that the introduction of this new blancher created any significant change in the way blanching had been done at Wenatchee, at least none which impacted on the jobs of bargaining unit workers associated with the blanching operation.[71] Moreover, as a general proposition, it is not

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Fletcher testified that Simplot intended to, and eventually did, make arrangements with Columbia, the Quincy warehouse operator, to "purchase some refrigeration equipment from us and to expand their facility," to meet Simplot's needs. My assumption that the equipment in question came from Wenatchee (rather than from some more distant Simplot operation) is based on Wenatchee's proximity to Quincy.

[71] Shaw testified that the new blancher is more 'energy-efficient," and "far more technical to operate than the old style blanchers." The former information tells us nothing significant for purposes of a continuity-of-job analysis; the latter only hints at a possible difference between how Wenatchee blancher operators did their jobs and how Quincy blancher operators do their jobs.

obvious from this record that working on "newer" versions of production equipment has created any substantial change in the way the operators of counterpart equipment at Wenatchee had always done their jobs. The same observation is appropriate regarding the introduction of a new freeze tunnel – "the Cadillac of freeze tunnels," as one former Wenatchee worker gushed voluntarily – and the importation from one of Simplot's California plants of a line system used for processing pasta.[72]

An arguably different conclusion might be drawn in the case of the new batch peeler, used mostly for carrots, apparently, which peels skins with steam, rather than lye (as at Wenatchee), and which therefore avoids creating what Shaw called a "caustic residue that you had to put into a waste-handling system [at Wenatchee]." But again, it is not clear how this innovation might have impacted on traditional bargaining unit work associated with peeling carrots. A more obvious "change" occurred with the introduction at Quincy of a "laser color sorter" as part of the processing of peas; it is used to detect and remove deadly nightshade vines and berries, and it thus automates what apparently had been done by human eye and hand at Wenatchee. It is not apparent how many employees were affected by this, if any. Neither was it shown that the laser system could not have been introduced at Wenatchee, or, conversely, that there was something "different" about the Quincy operation as a whole

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[72] Admittedly, Wenatchee did not process pasta, but it is not evident that jobs on this processing line involve significantly different skills or techniques from those involved with processing vegetables at Wenatchee.

which made the laser system uniquely useful at Quincy. Finally, a "bar code" scanner system was introduced at Quincy, apparently for inventory control purposes, to some uncertain extent supplanting traditional manual records-keeping, but not eliminating it.

Seeking to quantify all this information, Simplot's counsel asked Shaw (my emphasis), "Approximately what percentage of Quincy's assets *now* are assets that were moved in from the Wenatchee plant?" Shaw replied, based on a recent out-of-court conversation with the Quincy plant's accountant, that "it appears to be about 15-20 percent of the value in the . . . Quincy plant with Wenatchee equipment." I will give little weight to this information: It is plain hearsay. It purports to depict the "valuation percentages" as of a recent date in Quincy's history – the date of Shaw's testimony in April 1991.[73] Shaw's "understanding" was that the Wenatchee asset values used by the accountant to make the comparison were based on tax depreciation schedules, not actual cost of replacement; to that extent, the "old" Wenatchee assets may have been artificially undervalued in comparison to the valuations placed on the "new" equipment bought for Quincy. The percentage of current Quincy assets which were former Wenatchee assets, even if valued appropriately, is still a largely meaningless figure; certainly it tells us next to nothing about the degree of "difference"

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[73] In this regard I note that Shaw elsewhere stated that a Wenatchee "bulk line" which was originally reinstalled at Quincy was only later replaced with a new line system. Therefore, the Wenatchee asset "percentages" mentioned at trial by Shaw may have changed substantially from the percentages which prevailed in Quincy's earlier months.

between the two plants from a functional or operational standpoint.[74]

Production capacity: The Quincy plant yields more product volume, and a somewhat wider range of frozen produce varieties and blends that did the Wenatchee plant. Shaw appears to acknowledge that this is largely a function of the Quincy plant's size, which permits the operation of several processing lines simultaneously. Thus, during the 1990 season, Quincy ran as many as three 20 product lines at once (lima beans, red potatoes, and corn), whereas Wenatchee could not conveniently handle simultaneous prime pack of different produce varieties.

Supplemental Analysis; Conclusions of Law

I. Matters of Labeling; The Applicability of *Harte's* Teachings

The parties are in contest at the threshold over how to label the relationship between Quincy and Wenatchee (Is Quincy "merely" a "relocated" version of Wenatchee? Is it instead a product of "merger" or "consolidation" and/or "expansion?" And no matter how those those preliminary labeling disputes might be resolved, can Quincy justifiably be labeled as a "new" operation?) These labeling questions are not inconsequential, but my view, informed by *Harte*, is that some of these labels, at

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[74] Thus, even if only "15-20 percent" of Quincy's "equipment assets" came from Wenatchee, it would be unreasonable to infer from this that Quincy is now "different" from Wenatchee by a factor of "80-85 percent."

least, are not necessarily outcome-determinative.[75] Rather, as I explain next, I will find labels useful only insofar as they illuminate the more basic inquiry, described in *Harte* as a search for "sufficient continuity."

Harte itself appears to recognize the limited utility of labels; it seemingly uses the term "relocation" broadly in some passages, implying that something more than a "mere" relocation situation may still require an extension of the old bargaining relationship to the new location, and conversely, something labeled as a "relocation" may nevertheless create a "new" operation, where it will be inappropriate to extend the old bargaining relationship to the new location; but in either case, the test is whether or not there exists "sufficient continuity" between the old and new operations. This is best exemplified in the following passage (278 NLRB at 948[)]:

> In relocation cases such as this, our task is to distinguish situations where the new facility is basically the same operation, simply removed to

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[75] An arguable exception is the label "new." That label has trivial significance when used for some purposes – any operation done at a different location than formerly is, to that extent, "new," especially when housed in a newly-constructed building; thus, I have not hesitated to refer to Quincy as the "new" plant. But "new" is also sometimes used by the Board as a conclusionary term of art, to describe an operation which is so "different" in terms of its operations and/or the identities of the employees making up its complement that the Board will find that a "real question concerning representation" exists at the "new" operation, and therefore that a union is not entitled to a legal presumption of "continuing majority status" simply because the union formerly represented employees at a different location. E.g., *Hudson Berlind Corp.*, supra.

> a new site, from those where the new facility is somehow a different operation from the original. [* * *] Given the complexity of modern business transactions, the determination of exactly what relationship the new plant bears to the old is not always easy to make. Nonetheless, we have developed standards . . . to determine when there is a sufficient continuity of operations[.]

But *Harte* more obviously refers to "mere" relocation situations when it reminds us that under the precedents, it will not matter that transferees from the old plant may be less than a *majority* in the new plant complement; rather, in such "mere" relocation cases, all that is required to perfect the old plant union's status as the representative of employees in the new plant is that " . . . the operations at the new facility are substantially the same as those at the old and . . . transferees from the old plant constitute a substantial percentage – approximately 40 percent or more – of the new plant employee complement."[76]

Simplot reads *Harte* differently; it takes the position that *Harte's* principles have no applicability because this is not a "relocation" case. This position draws arguable support from *Central Soya*, supra, where a differently-constituted Board found that the new plant in question involved "a consolidation as well as a relocation,"[77] and

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[76] For reasons discussed elsewhere below, I will not be required to apply a "substantial percentage" test, but I will find it necessary to rely on the other teachings recapitulated in *Harte* to reach my conclusions.

[77] 281 NLRB at 1309.

then noted that, "[t]he instant case is therefore distinguishable from *Harte & Co.* . . . and *Westwood Import* . . . which are exclusively relocation cases."[78] In *Central Soya,* however, the new plant employed in almost equal numbers workers from one former plant represented by the Grain Millers union and workers from another plant where employees had been historically unrepresented. In that unique context, the Board found it necessary to rely on "accretion" principles – and the fact that a "majority" (however slim) in the new complement were transferees from the former Grain Millers-represented plant – to conclude that the employer owed recognition to the Grain Millers.[79] And this, I think, explains the real significance of *Central Soya's* dictum about the "distinguishab[ility]" of that "consolidation" case from "exclusively relocation cases." Put another way, *Central Soya* does not reject *Harte's* broad focus on "sufficient continuity"; rather, it holds that where a genuine "consolidation" of complements of approximately equal size is presented, *Harte's* "substantial percentage – 40 percent or more" standard is not applicable, because in such a case *each* group could meet that standard. Accordingly, I think Simplot errs to the extent it presumes that *Harte* may be ignored except where "exclusively relocation" cases are presented. Rather, I am persuaded that *Harte's* focus on substantial continuity will apply even where the fact setting may involve other than a "mere relocation."

If I have misunderstood *Central Soya's* gloss on *Harte,* and if matters of labeling are more important than I have

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[78] Id., at fn. 6.

[79] 281 NLRB at 1309.

presumed above, I will record how I would label Quincy's relationship to Wenatchee: I have no difficulty finding that Quincy is not "merely" the Wenatchee operation "removed to a new site"; rather, Quincy embodies to a limited extent a "consolidation" and "expansion" of operations formerly done at both Wenatchee *and* Ferndale. But I observe that selecting the appropriate label in these circumstances may well depend on *which* "operation" is being focused upon. Thus, it is reasonable to label Quincy's prime pack operations as involving a "consolidation," in the limited sense that Quincy now prime packs a few produce varieties which only Ferndale had processed in the recent past and others which only Wenatchee had processed formerly. But the same obviously cannot be said about Quincy's repack operation. Ferndale had not done repack since late 1987; Wenatchee was Simplot's *only* repack operation in the Northwest until Quincy took those operations over in May, upon Wenatchee's final shutdown on April 30. Thus, if repack – the operation which occupies 7-8 months of Quincy's annual activities – is the focus, there can be little doubt that Quincy reflects something very close to a "mere" relocation of the Wenatchee operation.[80]

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[80] Put another way, the facts found above reveal strong elements of "continuity" between the Wenatchee and Quincy repack operations: Quincy "replaced" or "supplanted" Wenatchee's – and only Wenatchee's – repack. Quincy relied almost entirely on Wenatchee's repack equipment, on Wenatchee's frozen stores, and its repack-experienced employees, to begin repack operations of its own. Moreover, the Wenatchee transferees continued thereafter to be a majority in the complement used in the 7-8 months each year when repack is the dominant activity in the Quincy plant.

Supreme Court, U.S.
FILED
JAN 18 1995
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No. 94-908

In the Supreme Court of the United States

OCTOBER TERM, 1994

J. R. SIMPLOT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that there was a sufficient continuity of operations and of employees between petitioner's old plant and its new plant to warrant requiring petitioner to continue to recognize the union which represented the employees at the old plant as the representative of the workforce at the new plant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unpublished, but the decision is noted at 33 F.3d 58 (Table). The decision and order of the National Labor Relations Board (Pet. App. 6-8), including the decision of the administrative law judge (Pet. App. 9-84), is reported at 311 N.L.R.B. 572.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1994. The petition for a writ of certiorari was filed on November 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates food processing plants and related trucking businesses in several States, including the State of Washington. Pet. App. 23. In May 1989, petitioner was operating two plants in Washington: One, located in Wenatchee, was a year-round facility, which "prime packed" and "repacked" vegetables; the other, located in Ferndale, was a seasonal facility, which "prime packed" vegetables. *Id.* at 24.[1] At the Wenatchee plant, petitioner employed a core group of production and maintenance workers on a year-round basis, and hired additional seasonal employees for the harvest season, which generally ran from June 1 through September 30. *Id.* at 24, 26-27. At the Ferndale plant, petitioner maintained only a seasonal workforce, as its operations there were limited to the harvest season. *Id.* at 30 n.34, 35. Petitioner had historically recognized Local 760 of the International Brotherhood of Teamsters (the Union) as the collective-bargaining representative of the Wenatchee employees, and had executed a labor contract with the Union effective through April 30, 1990. *Id.* at 10, 24. The Ferndale employees were represented by a different Teamsters local. *Ibid.*

In May 1989, petitioner decided that, beginning with the 1990 harvest season, its Wenatchee and Ferndale operations would be centralized at a new facility, to be built in Quincy, Washington, some 30 miles from

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[1] "Prime packing" involves processing, freezing, and warehousing fresh produce in bulk storage containers during the harvest season. "Repacking" involves removing "prime packed" produce from bulk warehouse storage and repackaging it for shipment in customer-specified containers. "Repacking" operations are performed primarily outside of the harvest season. Pet. App. 24-26.

Wenatchee and 210 miles from Ferndale. Pet. App. 8, 19 n.17, 24, 28. Petitioner closed the Ferndale plant at the end of the 1989 harvest season. *Id.* at 35. Then, in January 1990, having determined that a substantial number of Wenatchee employees (the only nearby, large-scale source of experienced personnel) would transfer to the Quincy plant, petitioner informed the Wenatchee employees that, when the Quincy plant opened for business, it would be run on a non-union basis. *Id.* at 38, 40. Petitioner thereupon unilaterally established pay classifications and benefit programs for the Quincy plant without bargaining with the Union. *Id.* at 18, 38. On February 13, 1990, petitioner refused the Union's request for recognition as the representative of the employees to be hired at the Quincy plant. *Id.* at 37 & n.42.

In mid-April 1990, petitioner recruited Wenatchee employees to fill the 150 to 200 year-round positions that petitioner projected it would need to staff the Quincy facility. Pet. App. 40-41. Of the Wenatchee plant's approximately 177 year-round employees, between 150 and 160 applied for work at the Quincy plant, virtually all of whom were hired. *Id.* at 42-43. Because of the distance between the Ferndale plant and the Quincy plant (210 miles), petitioner did not regard the pool of former Ferndale employees as a likely source of personnel for the Quincy plant, and, in fact, former Ferndale employees ultimately constituted an insubstantial percentage of the Quincy workforce. *Id.* at 41 n.46, 69 n.82.

Petitioner closed the Wenatchee plant on April 30, 1990, the date on which the labor contract covering that facility expired. Pet. App. 18. Petitioner commenced operations at the Quincy plant on or about May 1, gradually phasing in former Wenatchee employees, along

with new hires. *Id.* at 51. Former Wenatchee employees at all times constituted a majority of the employees at the Quincy plant, except during the peak of the harvest season, which lasted from August 1 to September 30. *Id.* at 51-52, 70.[2] After the peak of the harvest season, the Quincy workforce shrunk to a core complement of 170 to 180 year-round employees, the majority of whom had transferred from Wenatchee. *Id.* at 52.

2. The General Counsel of the National Labor Relations Board (Board) issued an unfair labor practice complaint against petitioner. He alleged, *inter alia*, that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1), by refusing to recognize the Union as the bargaining representative of the Quincy employees, and by refusing to apply the terms of the expired Wenatchee labor contract to cover the Quincy plant. Pet. App. 12 & n.8.

a. After a hearing, the administrative law judge (ALJ) found that petitioner had violated the Act as alleged. Pet. App. 77. Initially, the ALJ noted that petitioner and the General Counsel were in disagreement as to the proper "label[]" to describe the relationship among the plants. *Id.* at 63. But, whether the Quincy plant was

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[2] On May 1, 1990, the Quincy workforce consisted of 55 Wenatchee transferees and 12 new hires (Pet. App. 45); by May 15, the workforce had grown to 113 employees, 81 of whom were Wenatchee transferees, and 32 of whom were new hires. *Ibid.* On May 25, petitioner held a "grand opening" ceremony at the Quincy plant; six days later, on May 31, the workforce consisted of 139 employees, 84 of whom were Wenatchee transferees, and 55 of whom were new hires. *Id.* at 45, 47. During the peak of the harvest season (August 1 through September 30) the number of Wenatchee transferees fluctuated from between 33 and 40% of the Quincy workforce, the majority of the workforce then temporarily consisting of seasonal new hires. *Id.* at 51-52 & nn.63-64.

regarded as "a product of a merger or consolidation" of Ferndale and Wenatchee (as urged by petitioner) or as "merely a relocated version of Wenatchee" (as urged by the General Counsel), the ALJ concluded that such labels were "useful only insofar as they illuminate the more basic inquiry," *ibid.* (internal quotation marks omitted), set forth by the Board in *Harte & Co.*, 278 N.L.R.B. 947 (1986), of determining "whether or not there exists 'sufficient continuity' between the old and new operations," so as to make it appropriate "to extend the old bargaining relationship to the new location." Pet. App. 64.[3]

Applying that test, the ALJ found that "Quincy is substantially the same from an operational standpoint as Wenatchee." Pet. App. 70. The ALJ explained that "Quincy's repack operation is, essentially, the Wenatchee repack operation 'relocated'"[4]; that "[t]he

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[3] In *Harte & Co.*, 278 N.L.R.B. 947 (1986), the employer relocated its operation to a new facility, and it transferred a sufficient number of its employees, who were covered by a union contract, to the new facility such that they comprised 40% of the workforce there; the remainder of the employees at the new facility were not represented by a union. *Id.* at 947-948. The Board held that the employer lawfully applied the union contract to its entire workforce, explaining: "[A]n existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage—approximately 40 percent or more—of the new plant employee complement." *Id.* at 948.

[4] The ALJ pointed out that: (1) although the Quincy plant was capable of processing a larger volume of produce than the Wenatchee plant, petitioner continued to prime pack and repack principally the same varieties of vegetables at both facilities (Pet. App. 53-54, 63); (2) to the extent that the Quincy plant handled different vegetable varieties, they did not require the creation of

employees used at Quincy when it started operations came mostly from Wenatchee"; that "[t]hose Wenatchee transferees were intended to and did comprise a majority of the complement used by Quincy during the largest part of its annual operations"; and that "[i]t was during only two months in Quincy's first year of operations that new hires temporarily outnumbered Wenatchee transferees." *Ibid.* The ALJ acknowledged that the Quincy plant did, to some extent, reflect a "consolidation" of operations formerly performed at Wenatchee and Ferndale, but only "in the limited sense that Quincy now prime packs a few produce varieties which only Ferndale had processed in the recent past and others which only Wenatchee had processed formerly." *Id.* at 67. However, the ALJ found that these limited indicia of "consolidation" were not a sufficient basis for finding that the Quincy plant was a "new" operation privileging petitioner's refusal to recognize the Union there. *Id.* at 68.

That was so, the ALJ concluded, for two reasons. First, the Quincy plant's prime pack operation did not "significantly change[] the nature of the historical operation at Wenatchee." Quincy "merely reflects a 'replacement' and 'expansion' of Wenatchee's operation," which had been too small to "allow it to prime pack *all* of

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any job classifications that had not existed at Wenatchee, or cause any change from the basic way produce had been handled at Wenatchee (*id.* at 57); (3) petitioner "relied heavily" on former Wenatchee managers to staff the Quincy plant (*id.* at 54); (4) virtually all of the Wenatchee repack equipment, and some of its prime pack equipment, was moved to the Quincy plant (*id.* at 44, 58); and (5) although petitioner installed some new equipment and a new quality control system at the Quincy plant, these changes did not significantly alter the basic manner in which employees had been performing their jobs at Wenatchee (*id.* at 55, 60-62).

the vegetable varieties flowing in during the Northwest harvest season." Pet. App. 68 (internal quotation marks omitted). Second, the Quincy plant's prime pack operation "did not involve the merger at a new location of transferees from two formerly distinct plant complements"; rather, the group of employees who transferred to the Quincy plant was composed "almost entirely" of Wenatchee employees, and only an "insubstantial" number of that group were Ferndale employees. *Id.* at 69 & n.82. Accordingly, the ALJ concluded that there did not exist at Quincy a "real question concerning representation" requiring petitioner to abstain from recognizing any union at the Quincy plant, pending a Board election. *Id.* at 69-70, 76-77.

The ALJ rejected petitioner's contention that, even if there were substantial continuity between the Quincy plant and the Wenatchee and Ferndale plants, it had a reasonable "good faith doubt" as to the Union's majority status at the Quincy plant, and thus was justified in refusing the Union's February 1990 request for recognition, since it anticipated that, during the peak of the harvest season from August 1 to September 30, seasonal hires would temporarily outnumber the Wenatchee transferees. Pet. App. 19-20, 70-71. The ALJ concluded that the relevant date for assessing the ratio of Wenatchee transferees to new hires under *Harte & Co.* was May 25, 1990, the date on which petitioner conducted a "grand opening" ceremony at the Quincy plant, because that was the date upon which the transfer of operations to Quincy was substantially completed. And, the ALJ found, on May 25, the Wenatchee transferees constituted a majority of the Quincy workforce. *Id.* at 45, 47, 72.

The ALJ further explained that, while the Board "prefers to run representation elections in 'seasonal' industries at or near the peak of the season, so as to enfranchise the largest number of employees" (Pet. App. 73), that general policy does not apply to a situation where, as here, the seasonal hires "are not likely to be around at next year's seasonal peak." *Id.* at 75. The ALJ added that the Board has never presumed that such seasonal employees "do *not* wish to enjoy collective representation, or the fruits of collective activity harvested by their fellow workers at an earlier point." *Id.* at 73 (internal quotation marks omitted).

To remedy petitioner's unfair labor practices, the ALJ ordered it, *inter alia*, immediately to recognize and bargain with the Union as the bargaining representative of all employees at the Quincy plant, to rescind any changes in terms and conditions of employment unilaterally imposed upon the Quincy employees, and to make those employees whole for any losses they may have suffered as a result of those unilateral changes. Pet. App. 80-81.

b. The Board affirmed the ALJ's findings and conclusions, and, with a clarification not relevant here, adopted the ALJ's remedial order. Pet. App. 6-8.

3. The court of appeals enforced the Board's order in an unpublished opinion. Pet. App. 1-5. The court found that substantial evidence supported the Board's finding that there was "continuity of enterprise between the Wenatchee and Quincy plants." *Id.* at 4. The court observed that "[t]he year-round Quincy employee complement is not significantly larger than that maintained at Wenatchee, former Wenatchee employees perform the same jobs under the same supervision at Quincy as they had at Wenatchee, the Quincy plant is only 30 miles from

Wenatchee, and the addition of certain varieties of produce at Quincy neither changed job duties and classifications nor altered the nature of [petitioner's] operations." *Ibid.* While the court disagreed with the Board's selection of May 25, 1990 as the relevant date for assessing the ratio of Wenatchee transferees to new hires at the Quincy plant, the court found that, "[e]ven in late August 1990 * * * former Wenatchee employees constituted at least 40 percent, or a substantial percentage, of the Quincy employee complement." *Id.* at 5.

ARGUMENT

As the court of appeals recognized, a change in the locus of an employer's operations does not necessarily eliminate the employer's obligation under Section 8(a)(5) of the Act to recognize and bargain with the union representing its employees. "[T]he question whether the union representing the employees at the former location should continue to represent the workers at the new location involves balancing the newly hired employees' interest in choosing whether or not to have union representation against the transferees' interest in retaining the fruits of their collective activity." *Harte & Co.*, 278 N.L.R.B. 947, 950 (1986). Thus, where there has been a change in the geographic location of the enterprise, the employer must continue to recognize the union if there is continuity in both the nature of the employer's operations and the bargaining unit. See *NLRB* v. *Marine Optical, Inc.*, 671 F.2d 11, 17 (1st Cir. 1982); *Lammert Industries* v. *NLRB*, 578 F.2d 1223, 1225 (7th Cir. 1978); *Harte & Co.*, 278 N.L.R.B. at 949. Where, on the other hand, there is a lack of such continuity—in particular, where two separate bargaining units, each represented by a different union, are merged into a single unit, effectively creating a new unit—then a

"question concerning representation" arises, and the employer must not recognize either union until the Board has determined the employees' representational desires through an election. See *Hudson Berlind Corp.*, 203 N.L.R.B. 421, 423 (1973), enforced, 494 F.2d 1200 (2d Cir.), cert. denied, 419 U.S. 897 (1974). In this case, the Board's finding that there was substantial continuity between the Quincy plant and the Wenatchee plant, and that the Ferndale plant bargaining unit had not been merged with the Wenatchee bargaining unit, was upheld by the court of appeals as supported by substantial evidence. Accordingly, further review of that issue by this Court is not warranted. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Nor does the Board's decision raise any other issue meriting this Court's attention.

1. Petitioner contends (Pet. 11-12) that, because the Quincy plant was a "consolidation" of the Wenatchee and Ferndale plants, the Board erred in applying the "continuity of enterprise" test of *Harte & Co.*, *supra*, to determine whether petitioner was obliged under the Act to recognize the Union at the Quincy plant. According to petitioner, the Board instead should have followed *Hudson Berlind Corp.*, *supra*, and concluded that the Quincy "consolidation" raised a "question concerning representation" which should be resolved through a Board election. Pet. 13. There is no merit to petitioner's claim.

In *Hudson Berlind Corp.*, the employer acquired two facilities, the employees of each of which were represented by different unions, and merged the two operations at a third facility. 203 N.L.R.B. at 421. The Board held that the employer violated Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), by, prior to the transfer of

any employees, recognizing the union which represented the employees at the larger of the two acquired operations as the representative of all of the employees at the third facility. 203 N.L.R.B. at 422. The Board explained that "the very circumstances of the merger raised a question concerning representation," since the employer "was faced with conflicting claims of two unions currently representing the employees to be transferred." *Id.* at 423. In those circumstances, the Board concluded, the employer was prohibited from voluntarily extending recognition to one of the two unions before a Board election had been conducted. *Ibid.*

Here, by contrast, the ALJ correctly found that no such question concerning representation had arisen at any time at the Quincy plant. Pet. App. 70. As the ALJ explained (*id.* at 69 n.83), there was "[an] absence in this case of a real 'merger' of employee complements from the two former plants," for it was "obvious" that "[petitioner] intended that employees from * * * Wenatchee * * * would fill the majority of the projected 150-200 year-round positions available at Quincy." *Id.* at 42-43. Petitioner did not consider former Ferndale employees to be "a likely source" for staffing the Quincy plant because of the large distance (210 miles) between the plants (*id.* at 41 n.46); and, in fact, former Ferndale employees comprised "only an insubstantial percentage of Quincy's new complement." *Id.* at 69 n.82.[5] Nor was the fact that Quincy prime packed some of the vegetables

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[5] As the ALJ noted, petitioner's personnel manager "hazarded a guess" that 16 former Ferndale employees "eventually * * * took jobs at Quincy." Pet. App. 41 n.46 (internal quotation marks omitted). Since the Quincy plant employed 170 to 180 year-round workers (*id.* at 31 n.36, 52), former Ferndale employees constituted, at most, less than 10% of the Quincy workforce.

that only Ferndale had previously packed sufficient to make Quincy a "new" operation. For, as the ALJ noted, "Wenatchee, too, was a prime pack plant," and "Quincy merely reflects a 'replacement' and 'expansion' of Wenatchee's operation." *Id.* at 68.

Thus, contrary to petitioner's assertion (Pet. 13), the decision below does not conflict with that of the Second Circuit in *NLRB* v. *Hudson Berlind Corp.*, 494 F.2d 1200, cert. denied, 419 U.S. 897 (1974). There, the Second Circuit simply affirmed, as supported by substantial evidence, the Board's finding that, because a question concerning representation existed as a result of the merger of bargaining units in that case, the employer violated the Act by recognizing one of the two unions involved without a Board election. 494 F.2d at 1203. Here, the Board correctly concluded that there was no merger of bargaining units, and hence no such question concerning representation existed, at the Quincy plant, and the court of appeals implicitly sustained that determination.

2. Petitioner contends (Pet. 13-15) that, even if the principles of *Harte & Co.* apply to this case, the Board, consistent with its policy respecting seasonal industries, should have assessed the ratio of former Wenatchee employees to new hires at the Quincy plant as of September 30, 1990, when the harvest season was at its peak, rather than as of May 25, 1990, the date of the Quincy plant's "grand opening." There is no merit to that factbound claim.

As the Board made clear in *Harte & Co.*, "the appropriate point in time for measuring whether a substantial percentage of the new work force is composed of transferees from the old location * * * [is] the date that the transfer process was substantially

completed." 278 N.L.R.B. at 949 (emphasis omitted). The ALJ reasonably concluded that the transfer process was substantially completed by May 25, 1990, at which time a majority of the employees at the Quincy plant were Wenatchee transferees. Pet. App. 45, 72. Although the court of appeals believed that the appropriate date for assessing the composition of the Quincy workforce was "late August," the court found that, even at that time, the Wenatchee transferees comprised a substantial percentage of the Quincy workforce. *Id.* at 5.

Nothing in the Board's policy regarding the holding of representation elections in seasonal industries required the Board to assess the composition of the Quincy workforce on petitioner's proposed date. Petitioner observes (Pet. 13-14) that "the Board has consistently held that seasonal employees who have a reasonable expectation of re-employment for the next season should be included in the unit for voting purposes." But the ALJ correctly found that principle inapposite here, because the workers whom petitioner hired for the peak of the 1990 harvest season "are not likely to be around at next year's seasonal peak." Pet. App. 75. Moreover, as the ALJ also noted, "the Board has never presumed that 'new' employees do *not* wish to enjoy collective representation, or the 'fruits of collective activity' harvested by their fellow workers at an earlier point." *Id.* at 73.

3. Petitioner finally contends (Pet. 16-20) that, even if the Board's decision in *Harte & Co.* is applicable to this case, the Board ignored the first element of the *Harte & Co.* test (whether operations at the new facility are substantially the same as those at the old facility) and instead relied solely upon the second element of that test (whether transferees from the old plant constitute a substantial percentage of the new plant employee

complement), in finding that it acted unlawfully by refusing to recognize the Union at the Quincy plant. There is no merit to that contention.

Petitioner's argument mischaracterizes the decisions of the Board and the court of appeals. Far from overlooking the question of continuity of operations, the Board specifically found that "Quincy is substantially the same from an operational standpoint as Wenatchee" (Pet. App. 70), and that, even though "Quincy now prime packs a few produce varieties which only Ferndale had processed in the recent past and others which only Wenatchee had processed formerly" (*id.* at 67), such changes at the Quincy plant did not "significantly change[] the nature of the historical operation at Wenatchee." *Id.* at 68 (internal quotation marks omitted). The court of appeals sustained the Board's findings as supported by substantial evidence. *Id.* at 4. The propriety of the court's determination raises only a factual issue that does not merit further review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. at 491.[6]

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[6] Contrary to petitioner's suggestion (Pet. 17), the Board was not required "as a matter of law" to find that the Wenatchee and Quincy plants were substantially different operations simply because the Quincy plant handled some new kinds of products. The Board decisions cited by petitioner (Pet. 17 n.2) establish no such rigid rule; moreover, as the ALJ found, "the introduction of new produce items or blends [at Quincy] was not shown to have itself created any job classifications not in existence at Wenatchee, nor any changes in the basic way prime pack and repack of a more limited range of produce varieties was handled at Wenatchee." Pet. App. 57. Furthermore, neither *American Fluorescent Corp.*, 275 N.L.R.B. 1097 (1985) (Pet. 18) nor *NLRB* v. *Massachusetts Machine & Stamping, Inc.*, 578 F.2d 15 (1st Cir. 1978), upon which petitioner relies (Pet. 19-20), supports petitioner's refusal to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1995

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bargain with the union, for those authorities are factually distinguishable from this case. In *American Fluorescent Corp.*, the Board, in finding the employer's refusal to bargain lawful, relied on the fact that, of the 63 employees at the new facility, only 12 were transferees from the old facility. 275 N.L.R.B. at 1097 n.1, 1099, 1102. And in *Massachusetts Machine & Stamping*, the court held that the employer had established a good-faith doubt as to the union's majority status at the new plant where, among other factors, only 11 of 22 employees working at the new plant on its first day of operations were transferees from the old facility, no further employees from the old plant had elected to transfer to the new plant, and the employer had a reasonable expectation that additional new hires would be added to the workforce at the new plant "within a very short period of time." 578 F.2d at 18-19.

(3)

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Respondent.

On Petition For A Writ Of Certiorari
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For The Ninth Circuit

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J. R. SIMPLOT COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ARGUMENT

In its Brief in Opposition, the National Labor Relations Board argues that *Hudson Berlind Corp.*, 203 N.L.R.B. 421 (1973), enforced, 494 F.2d 1200 (2nd Cir.), cert. denied, 419 U.S. 897 (1974), does not apply to the case at bar because there was no competing union demanding recognition as there was *Hudson*. That ignores the issue in questions concerning representation cases, where the choice for employees is always whether to be represented by a union *at all*, and, if the employees so chose, what union to have represent them. The Quincy plant employees should have had that choice, regardless of the

fact that the union from the then-closed Ferndale plant did not assert jurisdiction over the employees. A large percentage of the workforce was new because the workforce more than doubled. Perhaps they wanted no union at all, or a different union. The Board's decision gave them no choice at all.

The Board also argues that because former Wenatchee plant employees hold the majority of the "projected year-round jobs," the Union should represent all of the employees. The fact is that the prime-processing season runs from early June until at least late November, and actually later because of the addition of certain potato products. Thus, while former Wenatchee plant employees may staff the repack area of the plant, (which, contrary to statements by the Board, does operate during prime-pack season), to allow those few employees to be determinative of the representation status of the entire operation completely disenfranchises *all* of the seasonal employees.

The Board's continued insistence that the May 25, 1990 "grand opening" constituted the date of "substantial completion" of the "transfer" of operations is completely unsupported by the evidence and was rejected by the Ninth Circuit. It is undisputed that only a small portion of the repack area was actually operational as of May 25th. If there is no prime packing, then there is no future repack, because the products repacked into small containers are those that were prime packed during the previous harvest season.

The Board does not address the entire issue of disenfranchisement of seasonal employees, nor does it address the fact that *Harte & Co.*, 278 N.L.R.B. 947 (1986), did not

address seasonal employment because Harte & Co. was not a seasonal employer. This issue has not been previously addressed by the Board or the courts. Should the "substantially complete" transfer rule applied to a year-round employer be the same for seasonal employers in light of the Board's clearly-stated representation-election policy of having elections at peak season?

There was also no support for the ALJ's determination that the workers hired for the 1990 peak season "are not likely to be around at the next year's seasonal peak." (Pet. App. 75). The Personnel Manager, John Stone, testified that previous seasonal employees are notified and that there was an estimated forty percent turnover rate. Thus, there must be a return of approximately sixty percent of the seasonal employees each year.

Finally, the Board argues that the cases cited in Appellant's opening brief are "factually distinguishable" but then does not distinguish them – because it cannot. In *American Fluorescent Corp.*, 275 N.L.R.B. 1097 (1985), the Board held the employer's refusal to bargain lawful because only 12 of the 63 employees were transferees from the old facility. In the case at bar, as of the time the transfer was substantially complete and the Quincy plant was able to prime pack all vegetables harvested at that time, only 135 of 431 employees were transferees from the Wenatchee plant.

The Board also did not address the fact, as it attempted to distinguish *Massachusetts Machine & Stamping v. N.L.R.B.*, 578 F.2d 15 (1st Cir. 1978), that the court therein deemed important the fact that the employer, upon opening the new plant, had a reasonable expectation that additional new hires

would be added to its workforce at the new plant "within a very short period of time." Id. at 18-19. This was precisely the case at the Quincy plant in June, 1990 – the Company anticipated adding 300 employees in short order to process the many different varieties of vegetables that it had not processed in the Wenatchee plant.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

DATED this 8th day of February, 1995.

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